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THE
CALCUTTA
LAW REPORTS

OF
CASES

DECIDED BY THE

J COURT, CALCUTTA,

ALSO

JUDGMENTS OF H. M.'S PRIVY COUNCIL.

EDITED BY

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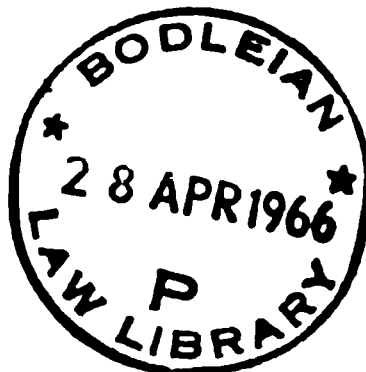
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CALCUTTA :

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Hon. SIR RICHARD GARTH, <i>Knight</i> ,	<i>Chief Justice.</i>
" FRANCIS BARING KEMP,	} <i>Judges.</i>
" LOUIS STEUART JACKSON, C.I.E.,	
" WILLIAM MARKBY,	
" CHARLES PONTIFEX,	
" WILLIAM AINSLIE,	
" ERNEST GEORGE BIRCH,	
" GEORGE GORDON MORRIS,	
" JAMES SEWELL WHITE,	
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" HENRY STEWART CUNNINGHAM,	
" WILLIAM FRASER McDONELL, V.C.,	
" HENRY THOBY PRINSEP,	
" HENRY LOFTUS TOTTENHAM,	} <i>Officiating as Judges.</i>
" HENRY PRICE DELVES BROUGHTON,	
" ALEXANDER THOMAS MACLEAN,	

Hon. FRANCIS BARING KEMP retired from the Bench on the 15th of April, 1878.

Hon. WILLIAM MARKBY retired from the Bench on the 14th of September, 1878.

Hon. ERNEST GEORGE BIRCH was absent on leave from the 16th of February, 1878.

Hon. GEORGE GORDON MORRIS was absent on leave from the 8th of April, 1878.

Hon. HENRY STEWART CUNNINGHAM was absent on deputation from the 11th of May, 1878.

The Hon. HENRY THOBY PRINSEP took his seat on the 22nd of August, 1878.

The Hon. HENRY LOFTUS TOTTENHAM officiated as a Judge from the 8th of April, 1878.

The Hon. HENRY PRICE DELVES BROUGHTON officiated as a Judge from the 11th of May, 1878.

The Hon. ALEXANDER THOMAS MACLEAN officiated as a Judge from the 19th of August, 1878.

The Hon. LOUIS STEUART JACKSON, C.I.E., officiated as Chief Justice from the 19th of August, 1878.

The Hon. ARTHUR WILSON was appointed a Judge of the High Court on the 14th of September, 1878.

The Hon. GREGORY CHARLES PAUL	... <i>Advocate-General.</i>
JOHN PITT KENNEDY, Esq.	... <i>Standing Counsel.</i>
JOHN D. BELL, Esq.	... <i>Offg. „ „</i>

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CALCUTTA

HIGH COURT REPORTS,

ORIGINAL, APPELLATE, AND REVISIONAL

[EXTRAORDINARY CRIMINAL JURISDICTION.]

IN THE MATTER OF TILUCKDHAREE.

1878

*Code of Criminal Procedure, section 263—Verdict of a Jury—Contrary
finding of High Court on the facts.*

March 22.

A majority of the jurors (four out of five) acquitted the prisoner on a charge of attempt to commit rape. The Sessions Judge disagreed with that verdict, and referred the case to the High Court under section 263 of the Code of Criminal Procedure, because in his opinion the offence charged was proved. The High Court found that the evidence for the prosecution was fully worthy of belief and consistent with probabilities, and sentenced the prisoner.

THIS is a case referred by the Sessions Judge of Patna to the High Court, under section 263 of the Code of Criminal Procedure, because he "disagreed with the verdict of the majority of the jurors" (four out of five), acquitting the prisoner on a charge of attempt to commit rape, and "considered it necessary for the ends of justice to do so."

The Sessions Judge in referring the case stated, "as I told the jury pretty plainly, I am of opinion that the offence charged is proved. There is nothing whatever to show that the case has been got up, and that the witnesses for the prosecution have spoken otherwise than truthfully. Neither is there any reasonable ground for the belief that the prosecutrix in any way connived in the attempt made on her chastity."

1878

The judgment of the High Court (1) was delivered by

IN THE
MATTER OF
TILUCK-
DHAREE.

Judgment.
JACKSON, J.

JACKSON, J. :—

We consider the evidence for the prosecution in this case to be fully worthy of belief, and consistent with probabilities. The question raised by the accused is not whether the complainant was or was not a consenting party—an issue which it is often extremely difficult to decide—but whether the entire story for the prosecution is false, the defence being alike. We agree with the Subordinate Judge and one of the jurymen in thinking that there is no reason to discredit the case for the prosecution; we convict Tiluckdharee of an attempt at rape, and sentence him to undergo rigorous imprisonment for two years, and also to pay a fine of 200 rupees, in default of payment whereof he is to undergo further rigorous imprisonment for one year.

(1) JACKSON and CUNNINGHAM, J.J.

[CRIMINAL REVISIONAL JURISDICTION.]

March 22.

IN THE MATTER OF KUDRUTOOLLA AND OTHERS.

*Charge—Trial—Commitment—Code of Criminal Procedure, section 220,
Explanation—Section 221.*

A Magistrate is not limited to passing an order of acquittal or conviction after a charge has been drawn up. There is nothing in the explanation to section 220 of the Code of Criminal Procedure which prevents a Magistrate from committing the accused for trial by the Court of Session even after the charge has been drawn up and the witnesses for the defence have been examined.

"Trial," as defined in section 4, means the proceedings taken in Court after a charge has been drawn up, and section 220 empowers a Magistrate to convict at any stage in the proceedings in a trial.

THIS is a case referred by the Sessions Judge of Backergunge to the High Court, as a Court of Revision, that the order of the Magistrate committing Kudrutoolla and others for trial by the Court of Session might be set aside as contrary to law.

The accused were brought before the Magistrate on a charge of rioting (section 147, Indian Penal Code). The evidence for the

prosecution was recorded, a charge was drawn up, his defence was taken and his witnesses were examined. The Magistrate then recorded what the Sessions Judge termed a judgment, but apparently not a judgment within the meaning of section 461 of the Code of Criminal Procedure, since he did not formally convict and sentence the accused. A few days later the Magistrate recorded an order that the charge was cancelled, and that the prisoners were committed for trial by the Court of Session.

The Sessions Judge referred this case to the High Court as a Court of Revision, because he considered that, "having drawn up a charge, the Magistrate was bound to convict or acquit," and he relied on the terms of the explanation to section 220 of the Code of Criminal Procedure, stating his opinion also that by the words "at any stage of the proceedings" in section 221, the Legislature meant before the charge was drawn up, so as to be consistent with the explanation to section 220.

The judgment of the High Court (1) was delivered by

CUNNINGHAM, J. :—

"Trial," according to the definition in section 4 of the Criminal Procedure Code, means the proceedings taken in Court after a charge has been drawn up. It is clear, therefore, that section 221 of the Criminal Procedure Code, which follows section 220, authorizes a Magistrate, although a charge may have been drawn up, to stop further proceedings and commit for trial: for this purpose section 221 may be regarded as a proviso to section 220. It may be added that, though the explanation to section 220 provides that if a charge is drawn up the prisoner must be either convicted or acquitted, it does not require that the conviction or acquittal should be by the Magistrate who drew it. We see no reason, therefore, to quash the commitment.

(1) JACKSON and CUNNINGHAM, J.J.

1878
IN THE
MATTER OF
KUDRUT-
COLLA.
Statement.

CUNNING-
HAM, J.

[CIVIL APPELLATE JURISDICTION.]

1878
January 18.

RAMJOY MUNDUL PLAINTIFF;
AND
RAM SUNDER MUNDUL AND OTHERS . . . DEFENDANTS.

Limitation—Rent Act, VIII. (B.C.) of 1869, section 27.

The limitation prescribed in Act VIII. (B. C.) of 1869, section 27, does not apply to a suit in which plaintiff sets out his title and seeks to have his right declared and possession given him in pursuance of that title.

SPECIAL APPEAL from a decree passed by the Officiating Judge of Furreedpore, reversing that of the Moonsiff of Goaulundo.

This was a suit by a ryot for possession of land by establishment of jote rights. The plaintiff obtained a pottah of the land in dispute on the 11th of December 1861, and held it under that pottah down to the 13th of April 1874, when he was forcibly dispossessed by the defendants. He then brought this suit for possession, making his landlord a party defendant, on the 12th of July 1875.

The Court of First Instance gave plaintiff a decree, which was reversed by the lower Appellate Court, on the ground that the dispossession was the act of the zemindar, the landlord, and that therefore, the suit was barred by limitation, not having been instituted within a year of the dispossession as required by section 27 of the Rent Act, Act VIII. (B. C.) of 1869. Plaintiff then brought this Special Appeal.

Baboo *Brija Shunker Mozumdar*, for Appellant.

Baboo *Issur Chunder Chuckerbutty*, for Respondents.

The judgment of the Court (1) is as follows :—

This was a suit, to use the words of the Full Bench ruling in 7 W. R., 187—*Gooroo Dass Roy vs. Ramnarain Mitter*, in which the plaintiff “sets out his title, and seeks to have his right declared

(1) KEMP and MORRIS, J.J.

and possession given him in pursuance of that title," and it is not simply a possessory action against a person entitled to receive the rent; therefore section 27, Act VIII. (B. C.) of 1869, will not apply. The decision of the Judge is reversed, and the case is remanded for re-trial on the other issues. Costs to follow the result.

1878
RAMJOY
MUNDUL
RAM SUNDER
MUNDUL
Judgment.

[CIVIL APPELLATE JURISDICTION.]

RAM NARAIN CHUCKERBUTTY AND OTHERS DEFENDANTS; January 18.

AND

POOLIN BEHARY LALL SINGH AND OTHERS PLAINTIFFS.

Arrears of Rent—Abatement—Laches—Limitation.

Plaintiffs (patnidars) sued the defendants (dar-patnidars) for arrears of rent. The defendants alleged that a part of the land had been taken by the Government, twenty-four years previously, for the purposes of a railway, and they claimed an abatement on that ground: *Held*, that the Limitation Act does not in terms prevent a defendant from setting up such a defence; but that the great delay in this case, combined with other circumstances, disentitled the defendants to any relief in a Court of Equity.

SPECIAL APPEAL from a decree passed by the Judge of East Burdwan, affirming that of the Moonsiff of Raesgunge.

The plaintiffs were patnidars of a certain mouzah, and they sued the defendants who held as dar-patnidars to recover arrears of rent of 1282 and 1283. The defendants stated that nineteen beegahs had been taken up for railway lines and claimed to be entitled to an abatement on that ground. The Moonsiff decreed the plaintiffs' claim, on the ground that the kabuliati given by the defendants precluded them, by its terms, from claiming an abatement on any ground whatever. The defendant appealed to the District Court, the judgment of which is as follows: "The clause in the kabuliati upon which the Moonsiff has decided against the applicants is—'I will make no objection and bring no suit in respect of any item of inundation, drought, diluvion, covering by sand, embankment, excavation, unculturable, fallow, lost land, &c.' I think land taken up for public purposes and paid for by Govern-

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 RAM NARAIN
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 POOLIN
 BEHARY LALL
 SINGH.

Statement.

ment cannot come within this category, which enumerates the different modes by which a landlord's rent may be reduced in consequence of loss or injury to the land. Here there was neither loss nor injury, but a compulsory sale; and if the patnidar had received the price of the land taken for the railway, either in a lump sum, or partly in remission of his rent, I think it would be impossible to say that the above clause of the kabuliati could be so construed as to enable him to keep this price, and continue to take rent for the land so paid for. There is, however, another point in which the appellant must fail, and that is limitation. The land was taken up for the railway more than twenty-four years ago. If the defendants had sued for abatement, they would have been barred by section 27 of Act VIII. (B. C.) of 1869, or, if that section do not apply to a suit for abatement of rent by a patnidar, by cl. 118, sch. 2 of Act IX of 1871. They were before sued for rent and did not set up the defence of abatement. I think that under these circumstances they cannot, after such a lapse of time, be allowed to succeed on this plea." The defendant then brought this special appeal.

Mr. M. L. Sandel, for Appellants.

Baboo Rash Behary Ghose, for Respondents.

The judgment of the Court (1) was delivered by

GARTH, C.J. GARTH, C.J.:—

We think that these appeals should be dismissed, though not quite upon the ground which has been relied upon by the District Judge. The provisions of the Limitation Act do not in terms apply to defendants; and we are certainly not prepared to lay down as a general rule that a defendant cannot set up a right by way of defence which he would be precluded by the Limitation Act from setting up as a plaintiff by way of substantive claim.

But Courts of Equity are constantly in the habit of applying the doctrine of presumption in cases to which the statutes of limitation do not in terms extend; and we think that this is just one of those instances in which a conclusive presumption is cogent.

(1) GARTH, C.J., and BIRCH, J.

to be made against the defendant's plea. It appears that twenty-four years have elapsed since the land was taken by the railway company. The defendants' predecessors, and the defendants themselves, have all that time continued to pay the old rent, though fully aware of the circumstances of which they now seek to take advantage; and it is remarkable that they made no attempt to enforce their ground of abatement, until their landlord's interest was represented by a minor, who would, of course, be ignorant of what took place at the time when the railway was made. It is very possible that, in consequence of the railway, the land may have increased in value, or that some arrangements then took place between landlord and tenant, the evidence of which at this distance of time may not be forthcoming.

The father of the present defendants survived some years after the railway was made. He took no steps to obtain an abatement of the rent, or to give up his tenure; and no explanation whatever has been offered on the part of the defendants of their not having claimed any abatement until the present suit was brought. We think, therefore, that we ought to presume conclusively against the truth of the attempted defence, and we dismiss the appeals with costs.

1878

RAM NARAIN
CHUCKER-
BUTTYv.
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BEHARY LALL
SINGH.Judgment.

GARTH, C.J.

[CIVIL APPELLATE JURISDICTION.]

1878
January 20.

DEWAN MAHOMED ASSUR AND OTHERS . DEFENDANTS ;

AND

POGOSE AND ANOTHER PLAINTIFFS.

Suit for a Kabuliati—Enhancement—Tender of Pottah—Notice of rate of Rent demanded—Decree for Kabuliati at rate fixed by Court.

A brought a resumption suit against B, which was decreed in his favour. He then sued for a kabuliati without giving B any notice of the amount of rent for which he desired the kabuliati to be given, or without having tendered a pottah to him: *Held*, that the Court was not competent to treat the suit as one for enhancement, nor to give a decree for a kabuliati at a rate fixed by the Court itself; and that the plaintiffs' suit should have been dismissed.

In order to succeed in a suit for a kabuliati it is necessary that the landlord should state the rate of rent which he wishes the tenant to give him.

Gagan Manjhi vs. Gobind Ohunder Khan, 1 C. L. R., 241, cited and followed.

SPECIAL APPEAL from a decree passed by the First Subordinate Judge of Mymensing, modifying that of the Moonsiff of Bajitpore.

Baboo Bykanto Nath Dass, for Appellants.

Baboo Grija Sunker Mozoomdar, for Respondents.

The facts of the case are sufficiently set forth in the judgment of the Court (1), which was delivered by

GARTH, C.J. GARTH, C.J. :—

We consider that this case must be governed by our judgment in Letters Patent Appeal No. 2158 of 1876, which we delivered on the 28th of November last. (2) It appears that the landlord having succeeded in a resumption suit which he had brought against the tenant, sued the tenant for a kabuliati without giving him any notice of the amount of rent for which he desired the kabuliati to be given. One of the issues settled by the Moonsiff was, whether the landlord had ever tendered a pottah to the tenant, and it was

(1) GARTH, C.J., and BIRCH, J.

(2) 1 C. L. R., 241.

[CIVIL APPELLATE JURISDICTION.]

1878
January 28.

TRILOCHUN *alias* KOYLASH CHUNDER }
CHATTAPADHYA } DEFENDAN

AND

NOBOKISHORE GUTTUCK PLAINTIFF

*Res judicata—Misjoinder of parties—Leave to bring a subsequent suit
Limitation.*

The heir of A brought a suit for possession against B and C, claiming that B claimed under a forged will, and C under a fraudulent deed of sale from A. The Moonsiff, holding that the parties were properly joined, upheld the deed of sale, but decided against the will. The plaintiff appealed against the finding as to the deed of sale, and B appealed against the finding as to the will. The lower Appellate Court dismissed the appeal on the ground of misjoinder, reserving leave to the plaintiff to bring separate suits against each defendant: *Held*, that a subsequent suit against C was not barred by section 2, Act VIII of 1859.

On the death of A, his property was taken possession of by C under an alleged deed of sale from A: *Held*, that a suit by A's heir for possession, and to set aside the deed, was governed by Act IX of 1859, sch. II, cl. 145, and not by cl. 93.

SPECIAL APPEAL from a decree passed by the Officer of the District Judge of Furrædpore, reversing that of the Moonsiff of Mungunge.

The plaintiff is the next heir of one Kaliprosad Chowdhry who died on the 2nd of September 1871, when plaintiff came forward to assert his right of inheritance. He was met by the defendant in this suit, who claimed to hold under a deed of sale from the deceased, dated the 27th of May 1871, and by parties of the name of Chowdhry who claimed the remainder of the property under an alleged will of the deceased, dated the 3rd of June 1871. The plaintiff brought one suit for the recovery of possession against all the adverse claimants. A plea of misjoinder was raised, and an issue framed thereon, and the Moonsiff, having decided that the cases were proper to be tried together, found in favour of the sale and against the will. The plaintiff being dissatisfied

1878
 TRILOCHUN
alias
 KOYLASH
 CHUNDER
 CHATTAPA-
 DEYA
 v.
 NODOKISHORE
 GHUTTUCK.
 Judgment.

appeal being that the suit is barred by section 2. The JUDGE has quoted one portion of Mr. SUTHERLAND's judgment in support of his view, and no doubt that supports him; but we think that is another portion of that judgment which shows even more conclusively that this decision of Mr. SUTHERLAND's cannot be treated as operating as an estoppel to this suit. Mr. SUTHERLAND says: "The first point in appeal raises a technical objection of great importance into which it will be necessary to go at length, because if the plea is held to be valid, plaintiff's claim must be rejected. After discussing the evidence, and referring to cases, Mr. SUTHERLAND then proceeds to say: "I hold that there has been a joinder in this case which is fatal to plaintiff's suit, and I therefore order that the appeal be decreed with costs; that plaintiff's suit be rejected, reserving the full right to proceed against defendants in separate suits, if not barred by the law of limitation or any other law in force." It seems to us that it is possible, after reading this judgment, to contend that the plaintiff's suit is barred under section 2; and we think that the Judge of the lower Appellate Court is right in saying that the suit as against Trilochun is not barred.

The next point taken before the Judge was, that the suit was barred by limitation. In what form the point was raised in the Court below does not appear. Then it is contended that Act No. 1 of 1871, sch. II, cl. 93, is the clause applicable to a suit of this nature. We think that this contention cannot be supported. The suit was one brought to recover possession by right of inheritance and on declaration of the plaintiff's right by inheritance. A prayer is also added to set aside the *kobala* dated the 14th Joist 1278.

It appears to us that the limitation applicable to such a suit is to be found in cl. 145. In that view of the case the suit is clearly not barred. The objection as to *res judicata* and limitation being thus disposed of, there appears to us to be nothing in the judgment of the lower Appellate Court which we can touch by special appeal.

The Judge says that the conclusion that he arrives at is that the deed of sale is false; and that, even if it was executed by this old man, the act was worthless; and upon a consideration

of the whole case, he reverses the judgment of the lower Court, and gives a decree for the plaintiff. The special appeal will be dismissed with costs.

1878

[CIVIL APPELLATE JURISDICTION.]

SHOOK DEB SHAHA AND OTHERS DEFENDANTS ; January 23.

AND

BREEMUTTY ALLADI AND OTHERS PLAINTIFFS ;

Auction sale for Arrears of Revenue—Cancellation of Under-tenures.

Where, at an auction sale for arrears of revenue, the Government becomes the purchaser of the property, and afterwards makes settlement with the former proprietors of the under-tenures, the question whether or not the Government cancelled the under-tenures existing at the time of the sale is one to be decided solely according to the effect of the proceedings taken by the Collector in each case.

It is a mistake to suppose that their Lordships of the Privy Council, in the case of *Kajjah Asanullah*, 13 Moore's Ind. Ap., 317; 13 W. R., 24 P. C., intended to lay down a general rule according to which all questions of this nature are necessarily to be decided.

SPECIAL APPEAL from a decision passed by the Judge of Muz, reversing that of the Moonsiff of Kaligunge.

In 1835 the Pergunnah Bowdohal was put up and sold for arrears of revenue, the Government becoming the purchaser. In 1836 the Collector brought a suit for assessment of rent of dar-talook owned by one Boistob Churn. The judgment in that suit states that the dar-talook was created since the time of the permanent settlement, recites the provisions of various regulations regarding the cancellation of such tenures, and orders "that the said dar-talook be annulled, its fixed rent cancelled, and its assessment be made agreeably to the usage and rates of the permanent settlement." The mouzaha comprising the dar-talook were settled with Boistob and his successors for a term of years, ending in the year 1862. On the 28th of September 1863, the Government sold the zemindari to the defendants.

1878
 SHOOK DEE
 SHAHA
 v.
 SREENUTTY
 ALLADI.
 Statement.

The plaintiffs alleged that the Government had settled the lands with them as a talook; and that the defendants had dispossessed them of that talook after the 28th of September 1853. The only evidence of the settlement with the Government was a kabuliat given by plaintiffs to the Government, after obtaining a lease of the mouzahs from 1253 to 1268 B. S. The Moonsiff held that the subsequent settlements made by the Government with the plaintiffs and their predecessors, after it had cancelled the dar-talook, did not operate to restore their former rights in the mehal, and dismissed the plaintiffs' suit. This decision was reversed by the District Judge. Defendant then brought this special appeal.

Baboo Chunder Madhub Ghose, and Baboo Sreenath Banerjee for the Appellants.

Moonshee Serajul Islam, for Respondents.

The judgment of the Court (1) was delivered by

BIRCH, J. BIRCH, J. :—

In this case the Moonsiff has recorded a careful judgment, citing the law applicable to the case, and referring to a judgment passed in regular appeal by Chief Justice CORCH, (2) in support of the opinion he had arrived at. The Moonsiff held that the Government had cancelled the talookdari rights of the plaintiff's predecessor Boistob Churn, in the estate, and that the subsequent settlement made with Boistob Churn did not operate as a recognition of his talookdari right. This careful decision is reversed by the Judge in these words: "It appears to me that the Moonsiff's decision that Government cancelled the talook is entirely opposed to the Privy Council ruling in the well-known case of *Obba Churn vs. Khajah Asanullah*." (3)

We think that, before the Appellate Court could set aside such a judgment as that of the Court of First Instance in this case it was bound to consider the facts found by the Moonsiff and the case cited by him. Each case must be governed by its own circumstances; and it is a mistake to suppose that the judgment

(1) BIRCH and MITTER, J.J.

(2) *Kasee Moonshee Aftabooden Mahomed vs. Sunioollah*, 28 W. R., 24.

(3) Reported in 13 Moore's Ind. Ap. 317; 13 W. R., 24 P. C.

1878
 ~~~~~  
 PROMOTHO  
 NATH  
 BANERJEA  
 v.  
 JOGENDRO  
 NATH ROY.

Statement.

Promotho Nath. Gora Chand had held a darpatni talook in name of one Issur Chunder Roy; and after his death the p dar (the present plaintiff) brought a suit for arrears of against Issur Chunder. In this suit, Kudomini (the wife of P Chunder, the *Kurta* of the family) intervened, claiming the patni as hers, and a decree for the arrears was given against with her consent. Under that decree the *darpatni* tenure sold and purchased by the decree-holder. The sale of the *ts* was insufficient to pay the amount of the decree.

It appears that, after the rent decree was passed against K mini, the grandsons, by their guardian, instituted a suit against Purno Chunder for their share of the family property, and a decree for an 8-annas share of the darpatni talook, and other property. While this matter was pending, the darpatni was in execution of the rent decree as above mentioned.

The plaintiff then brought the present suit against P Chunder and the grandsons (making Kudomini a *pro forma* defendant) to recover the balance remaining due and unsatisfied under the rent decree. The grandsons (one of whom is still a minor) contended that they could not be liable for the rents of the darpatni which had never been in their possession; and that, having recovered a decree for a specific share of the property, they should not be sued jointly with Purno Chunder. The suit was dismissed against them in both the lower Courts, and then they brought this special appeal.

Baboo Hem Chunder Banerjee and Baboo Chunder Ghose, for Appellants.

Baboo Sreenath Dass and Baboo Rash Behary Ghose, Respondent.

The judgment of the Court (1) is as follows:—

We think that in this case the lower Appellate Court has come to a right conclusion. It has been found that the real owner of the tenure, the rent of which is the subject-matter of the suit, was the ancestor of all the defendants, who inherited it at his death along with other properties. So far as the zemindary

(1) BIRCH and MITTER, J.J.

concerned, they are therefore all jointly liable for the rent. Consequently, the contention of the special appellants that a joint decree against them and Purno Chunder should not have been passed, ought not to prevail. The special appeal is accordingly dismissed with costs.

1878

## [CIVIL APPELLATE JURISDICTION.]

HURRI NARAIN ROY CHOWDHRY . . . DEFENDANT; *January 25.*

AND

ROY DURGA DASSI . . . PLAINTIFF.

*Jurisdiction—Small Cause Court—Detinue—Special Appeal.*

Plaintiff, a talookdar, sued her late husband's agent for the delivery up of certain account papers and documents; for an account of his agency, and, in default of account, for Rs. 500 as damages: *Held*, that the suit was of a nature cognizable by a Small Cause Court, and that consequently no special appeal would lie.

**SPECIAL APPEAL** from a decree passed by the Judge of Jessore, reversing that of the First Sudder Moonsiff of that District.

This was a suit to obtain from the defendant certain account papers and certain documents. The plaintiff alleged that the defendant was the general manager for her deceased husband; that he failed to render proper accounts; and that he also omitted to make over certain documents which were in his possession, and hence she brought this suit for obtaining from the defendant a *nikash*, and the collection papers from 1272 to 1281, and the documents that were in the custody of the defendant, or for recovering Rs. 500 in case the *nikash* be not rendered.

The suit was dismissed in the Court of First Instance, but, on appeal, was remanded by the lower Appellate Court for re-trial. Against this order the defendant specially appealed to the High Court.

Baboo *Bungsheddur Sen*, for Appellant, contended that no special appeal would lie, the suit being one cognizable by a Small Cause Court.

Baboo *Rashbehary Ghose*, for Respondent.

1878

HURRI NA-  
BAIN ROY  
CHOWDHRY  
v.  
JOY DEEGA  
DASSI.

*Judgment.*

The judgment of the Court (1) is as follows:—

We think that the preliminary objection raised that, the suit being of the class cognizable by a Small Cause Court and for an amount not exceeding Rs. 500, no special appeal lies, must prevail. From the nature of the case it is evident that the suit is substantially a suit for money due. The prayer of the plaintiff is for *nikash*, and in case the *nikash* be not rendered, the plaintiff assessed her loss at five hundred rupees.

The appeal must be dismissed with costs.

(1) BIRCH and MITTER, J.J.

[CIVIL APPELLATE JURISDICTION.]

January 28. DULI CHAND AND ANOTHER . . . . . PLAINTIFFS;  
AND

MONOHUR LALL UPADHYA AND OTHERS . DEFENDANTS.

*Mortgage Bond—Equitable Assignment of prior Lien—Equitable Relief—False Allegations of Fraud.*

A pledged certain lands to B in 1865; and on the 24th of July 1868 granted a *mokurari* lease of the same lands to C. On the 5th of Jan 1868, shortly before the granting of the *mokurari* lease, A executed a simple mortgage of 8 annas of the same lands to D. It was proved that the consideration money given by C for the lease had been expended in paying off B's mortgage, and that the bond had been made over to C, though not formally assigned to him: Held that, under these circumstances, C was entitled to stand in the place of the first mortgagee; and that he was to be considered as having taken a regular assignment of the bond.

Where a party, who, as the facts really stand, would be entitled to equitable relief, misrepresents his case, falsely charges the opposite party with fraud and collusion, and does not rely on his equitable rights, he will be debarred by such conduct from obtaining any relief in a Court of Equity.

**R**EGULAR APPEAL from a decree passed by the Subordinate Judge of Gya.

This was a suit for a declaration of right to, and for possession of, an 8 annas share in certain mouzabs. The facts of the case are



as follows : On the 24th of August 1865, the then proprietor, Baboo Gouri Byj Nath, hypothecated 8 annas of the disputed lands to one Jugger Nath Singh to secure the payment of Rs. 26,850. On the 24th of July 1868, the same proprietor executed a *mokurari* lease of the same 8 annas, in favour of the defendants for the sum of Rs. 22,000 paid down, and an annual rent of Rs. 2,200. At this time the balance remaining on the hypothecation of 1865 was Rs. 20,500. Out of the money paid by the defendants for the *mokurari* grant, this balance was paid off; and the bond was delivered to them, but not formally assigned. A short time previous to these transactions, the whole 16 annas of the property was hypothecated by two bonds, dated the 22nd of May 1867 and the 5th of June 1868, for the sum of Rs. 16,554-4, to one Deodhari Singh, who, on the 3rd of February 1871, obtained a decree for sale of the land hypothecated, in the execution of which plaintiff became the purchaser. The defendants refused to give up possession when called upon to do so, and then this suit was brought.

1878  
DULI CHAND  
v.  
MONOHUR  
LALL UPAD-  
HYA.  
—  
Statement.

The Court of First Instance dismissed the suit, and plaintiff appealed on the ground (*inter alia*) that the lower Court was bound to enforce the lien created in favour of the decree-holder Deodhari Singh by the hypothecation of 1868, against the defendants.

*Branson*, for the Appellants. Mr. C. Gregory and Baboo Nil-madhab Sen, with him.

*Evans* for the Respondent. Mr. R. E. Twidale, Baboo Mohesh Chunder Chowdhry, and Moonshee Mahomed Yusuf, with him.

The judgment of the High Court (1) is as follows :—

The appellants before us were plaintiffs in the Court below. They brought their suit to recover *seer* or immediate possession of certain mehals "by setting aside the alleged '*mokurari* *ottah*' set up by defendant No. 1, Monohur Lall.

The ground of the plaintiff's claim was this: The late owner, Gouri Byj Nath Prosad, had executed in favor of Deodhari Singh and others two successive bonds, dated, respectively, 22nd of May 1867 and 5th of June 1868, for the repayment of moneys therein

(1) JACKSON and McDONNELL, J.J.

1878  
 DULI CHAND  
 v.  
 MONOHUR  
 LALL UPA-  
 DHYA.  
 Judgment.

specified, and pledging by way of security mehals Belrapati (or Balvaid) and Belur; that, under the terms of the bond of June 1868, those creditors brought a suit and obtained a decree on the 3rd February 1871, for sale of the property so hypothecated, whereupon the rights and interests of Gouri Byj Nath, the debtor, were sold in execution on the 11th December 1872, and purchased *benames* by the plaintiff; that the plaintiff, on proceeding to obtain possession, was resisted by defendant No. 1, who alleged himself to be holding under a *mokurari*; that such *mokurari* being of a date subsequent to the mortgage of June 1868, and contrary to the stipulations of the bond, was invalid and of no effect; and that the defendant, by omitting to satisfy the mortgage, had disentitled himself to protection and extinguished his own rights.

From the defendant Monohur Lall's answer it appears that his brother Juggoo Lall was owner of rather more than a half share of the *mokurari*, and he was accordingly added as a defendant. His written statement elicited the fact that, antecedent to either of the mortgage to Deodhari and others, there had been a pledge of the same property to Jugger Nath Singh, under date 24th August 1865, and that the *nuzurrannah*, Rs. 22,000, paid as consideration for the *mokurari*, had been applied (at least in part) to the satisfaction of Jugger Nath's claim. The written statement made no express mention of the fact, but the evidence showed that the bond to Jugger Nath had been made over to the defendants, though not formally assigned to them.

The defendants further pointed out that, although their *mokurari* grant was duly registered, they had not been made parties to the suit brought by Deodhari and others, who, it was urged, must have had full knowledge, and consequently they (defendants) could not be affected by the decree; that defendants had intervened in the execution proceedings, setting up their *mokurari* title; and that in consequence plaintiffs had purchased the owner's right subject to the *mokurari* for a very small sum relatively to the value of the property; that, consequently, the plaintiff was only entitled to be paid the *mokurari* rent, which had been paid with unflinching regularity.

It may be added that each party charged the other, and also Gouri Byj Nath, with fraud, collusion, concealment of the trans-

ations with the other side, and so forth; but these allegations were mutually given up in the Court below, and the revival of them in the grounds of appeal to this Court appears to be due to inadvertence on the part of the vakeel who filed them.

The Subordinate Judge dismissed the suit, being of opinion that the plaintiff was not entitled to recover possession as against the defendants who were no parties to the suit or the mortgage, though as a general rule the purchaser would have a right to enforce the mortgagee's lien by proceedings against such third party in possession; that in this case, however, the defendants were in possession under a *mokurari*, for which they had given consideration which had been applied to the satisfaction of an earlier mortgage; and that the interest remaining to the mortgagor after the creation of such incumbrance was more than equal in value to the purchase-money paid by the plaintiff. The plaintiffs contend in appeal that this judgment is erroneous; that the mortgagor, in creating the *mokurari* after the last mortgage, had acted contrary to his express contract and in excess of his rights and powers; and their counsel argued that at any rate the Court below ought not to have refused them the relief to which they were equitably entitled, viz., a declaration that they might obtain possession by re-paying defendants the amount of their advance.

We are clearly of opinion that, as argued by Mr. Evans for the respondent, defendants are entitled to stand in the place of the first mortgagee, that is, to be treated as if they had taken a regular assignment of his pledge; and we think the Court below was manifestly right in refusing to decree possession. The Subordinate Judge, however, has gone beyond this, and apparently held that the plaintiffs were not entitled to any relief whatever. It has been a question for consideration with us whether we ought to make any further order in the suit. No doubt as matters stood before the filing of the plaint, both were in the position of innocent parties who had given consideration, and there might be a question which ought to give way to the other; but we observe that the plaintiffs ask for no equity, nor do they recognize the equitable rights of the defendants, with full knowledge that the defendants were in possession of this property under a perpetual

1878

DULI CHAND

v.

MONOHUR  
LALL UPA-  
DHYA

Judgment.

1878  
DULI CHAND  
v.  
MONORUB  
LALL UPA-  
DHYA  
—  
Judgment.

lease for which they had given consideration a good deal larger than what they had themselves paid after notice of their claim. They insisted on their purchase, ignored the justice of the defendant's case, and demanded, *simpliciter*, their ejection. This, consequently, appears to us to be, as Mr. Evans said, an unconscientious suit. Again, in making their appeal to this Court, the plaintiffs are altogether silent as to equitable considerations. They rely again on their absolute right to possession over-riding the *mokura* and the other rights of the defendants; and that, passing by the mistaken grounds to which we have already referred, is the only aspect in which their case is presented by the memorandum of appeal.

Under these circumstances, as the mortgagee's rights were based on an instrument dated not further back than 1868, and the plaintiffs purchased in 1872, we think they are not entitled to ask the eleventh hour for relief of an entirely different kind from that which they sought by their plaint; and that our dismissal of the appeal ought not to be accompanied by any declaration in the plaintiff's favour. The appeal is dismissed with costs.

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## [CIVIL APPELLATE JURISDICTION.]

HAMADANISSA BEEBEE . . . . . PLAINTIFF;

AND

RASUTOOLLAH SIRDAR . . . . . DEFENDANT.

1878  
January 28.*Res judicata*—Issue not decided in previous suit—Suit for Arrears of rent.

A and B were co-sharers in a certain talook to the extent of 7 annas and 4 annas respectively. B died in 1268, and in 1872 A, who used to collect the rents on behalf of B, brought a suit against one of the ryots for the rent of the 11 annas. An issue having been raised as to the extent of A's share, omitting that of B, it was decided to be 7 annas only, and he got a decree accordingly. In a subsequent suit by A's widow against the same tenant for the rent due for the 11 annas share, *Held*, that the decision in the former suit did not debar her from showing that she was entitled to the rent due on account of B's 4 annas share.

**SPECIAL APPEAL** from a decree passed by the Judge of 24-Bargunnahs, modifying that of the Second Moonsiff of Satkheerah.

The plaintiff's husband, Nujib Chowdhry, was a sharer in a certain talook to the extent of 7 annas 4 gundas. One Kooshum Beebee was another sharer in the same talook to the extent of 4 annas 2 gundas. It appeared that Nujib used to collect the rents on behalf of Kooshum who died in 1268, and in 1872 he brought a suit for arrears of rent of 11 annas 6 gundas against the present defendant, and then it was decided that he was entitled to rent for 7 annas 4 gundas only, on the ground that that was the extent of his share.

The plaintiff now sued for arrears of rent in respect of 11 annas 6 gundas share, and the defendant contended that the former suit brought against him by plaintiff's husband conclusively settled that she was not entitled to rent for more than a 7 annas 4 gundas share.

Plaintiff got a decree in the Court of First Instance, which was reversed on appeal. She then brought this special appeal.

Baboo Bhowany Churn Dutt, for Appellant.

Mr. H. E. Mendies, for Respondent.

1878

SHAMADANIS-  
SA BEEBEE  
v.  
FERASUTOOL-  
LAH SIRDAR.

*Judgment.*

The judgment of the High Court (1) is as follows :—

• In this suit the plaintiff sued to recover the arrears of rent from the defendant, alleging that her share in the estate was 11 annas and 6 gundas. The defendant did not dispute the amount of rent claimed, but he disputed the extent of the plaintiff's share, and contended that she was only entitled to a 7 annas and 4 gundas share.

Upon this the Moonsiff framed amongst other issues one to this effect : " What was the extent of the plaintiff's share," and proceeded to consider the effect of the decree of the 29th December 1872, which was filed by the defendant. In the suit in which that decree was passed, the predecessor of the plaintiff had claimed an 11 annas and 6 gundas share, but it had been decided that the plaintiff was not entitled to receive rent to the extent of more than a 7 annas and 4 gundas share. The Moonsiff was of opinion that the decision in that case could not operate as an estoppel : that that decree was passed in consequence of the plaintiff not appearing in Court as a witness, and not upon an adjudication of the rights of the parties ; that it was evident from the judgment that no evidence was produced on this particular point by either party. Therefore the Moonsiff says : " I am of opinion that the decree in question is no bar to my entering into this question in the present suit." The Moonsiff then proceeds to consider the proceedings under Act XXVII of 1860, and the robocari in the dakhil kharij case, and then he points out that in his deposition in this case the defendant has admitted that the plaintiff's husband's own share was 7 annas and 4 gundas ; and that Kooshum Beebee's share was 4 annas and 2 gundas, and that the plaintiff's husband had been in possession of Kooshum Beebee's share. Then the Moonsiff says that he is of opinion that the plaintiff's share is 11 annas and 6 gundas, and that she is entitled to receive rent to the extent of that share. He accordingly gave the plaintiff a decree.

Upon appeal to the Judge, he was of opinion that the decision in the former case was conclusive against the plaintiff. He says that an issue as to the plaintiff's husband's share was raised in the suit, and that it was decided that he was not entitled to more than

(1) BIRCH and MITTER, J.J.

7 annas and 4 gundas share. The Judge finds fault with Moonsiff for giving so much importance to the proceedings under Act XXVII of 1860, and says that the robocari of the factor does not show that the plaintiff's husband inherited Kooshum Beebee's share. The Judge goes on to remark: "It was perhaps the absence of these documents in the former suit that caused the plaintiff's husband to lose his case." The Judge decreed the appeal and decided that the plaintiff's share is only 7 annas and 4 gundas. It seems to us that the Judge has made a mistake in this case. It is true that there was an issue raised in the former suit as to what the plaintiff's husband's share was, but that was an incidental issue, and it was not really decided in that case upon evidence what the plaintiff's husband's share was. In the present suit the defendant in his defence admits that Kooshum Beebee died in 1268; that the plaintiff's husband used to take the rent of Kooshum Beebee's share, and that her share was omitted from consideration in the former suit. Taking these statements of the defendant, with the findings of the Moonsiff upon the other documents in the case, we think there is no doubt that the judgment of the Moonsiff in this case is a correct one, and that the Judge of the lower Appellate Court is wrong in setting that judgment aside. We, therefore, on the appeal, reverse the decision of the lower Appellate Court, and restore the decree of the Court of First Instance with costs. The appellant is entitled to the costs of this appeal.

1878  
SHAMADANT-  
SA BEEBE  
v.  
FERASUTOOL-  
LAH SYEDAN.  
Judgment.

## [CIVIL APPELLATE JURISDICTION.]

1878 JOOMNA PERSHAD SOOKOOL AND } PLAINTIFFS  
January 22. OTHERS . . . . . }

AND

JOYRAM LALL MAHTO AND OTHERS . . . DEFENDANTS

*Mortgage Transaction—Lease to Mortgagees of Property mortgaged—  
of Redemption—Fraud and Collusion, allegations of.*

On the 1st of November 1866, A covenanted to pay to B Rs. 80,351 interest, on the 16th of May 1870, and pledged certain property re-payment thereof. At the time of the mortgage this property held by B, the mortgagee, under a lease which expired on the 10th September 1870. On the 5th of November 1866, A granted a lease of the property hypothecated for a term of seventeen years from 10th of September 1870, at a rent of Rs. 20,541 a year. The lease contained an agreement that, out of the annual rent, B should retain 16,500 on account of the debt, and pay the remainder to A. In order to redeem and cancel the bond and lease: *Held*, that they did not constitute one mortgage transaction, but were separable and separate; and that A would only be entitled to set off the rent retained against the mortgage debt and interest, and thenceforth to receive the full rental of Rs. 20,541 a year for the term of the lease yet unexpired.

Where a party alleges the fraud or collusion of the opposite party as a ground of relief, general allegations of it will not be sufficient, but instances upon which such allegations are founded must be stated; it is unreasonable to require the opposite party to meet a charge of that nature without giving him a hint of the facts from which it is to be inferred.

**R**EGULAR APPEAL from a decree passed by the Subordinate Judge of Mozufferpore.

In this case the plaintiffs are minors under the Court of Wards, who sue by their next friend, the manager of the estate. The defendant, Churn Sookool, grand-uncle of the minors, and the late full owner of the property in dispute, died, leaving a widow Musamma Nedhu Looklain, who took the estate for the term of her life. The widow died on the 25th of March 1868, leaving her surviving



ra Pershad, the father of the minor, and Sham Pershad Sookool, a younger of Guru Pershad's, who succeeded to the property the next heirs of the Mussamut's husband. Sham Pershad died the 8th of June 1868, and Guru Pershad became entitled to the entire estate left by Hurchurn Sookool. He died in December 1869, leaving the plaintiffs his minor heirs. The family are subject to the Mitakshara law.

On the 1st of November 1866, the Mussamut was indebted to the defendants in the sum of Rs. 80,351, which had been advanced for the purpose of paying Government revenue, and in satisfaction of decrees passed against her. On that date she executed a bond mortgaging the property in suit for the payment of the debt. On the 5th of November 1866, she executed a ticca lease to the defendants for a term of seventeen years, commencing with the 1st of September 1870, the commencement of the Fusi year 1868. The lease recited the mortgage debt, and the necessity of providing for payment of it, and contained an agreement that, out of the annual rent, the defendants should retain Rs. 16,500 in account of the debt, and pay the remainder to the widow. After the Mussamut's death, the property being under the management of the Court of Wards, a suit was brought by the manager in the name of the minors to set aside the bond and lease as invalid against them. The suit was dismissed on appeal to the High Court (PHEAR and MORRIS, J.J.), who held that the deeds were valid against the plaintiff; that the transaction presented by the two deeds was unquestionably a mortgage transaction; and that the minors would have a right to redeem that mortgage, on bringing a suit properly framed for that purpose.

The plaintiffs then brought the present suit, praying that an account should be taken of all moneys due to the defendants, and all sums realized by them while they were in possession of the property under the lease; and for an order that, on the plaintiff's depositing in Court what sums should be found due to the defendants, the bond and lease should be declared null and

void. The defendants contended they were entitled to keep possession of the property for the full seventeen years under the terms of the lease, which was an arrangement fairly entered into for

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MAHTO.

—  
*Statement.*  
—

valuable consideration by competent parties; that the parties were not entitled to demand possession; and that they had no right to maintain any action without first paying the amount of the mortgage bond into Court, when they would be entitled to have the whole *jumma*, namely, Rs. 20,351 instead of Rs. 4,041, if only they were then entitled.

The Subordinate Judge considered that the parties had agreed how the debt should be paid, namely, by retaining a portion of the rent due under the lease; that they were fully competent to do so, and that the opinion of the High Court, declaring the mortgage and lease to be one mortgage transaction, was extra-judicial and not intended to be conclusive. He, therefore, dismissed the appeal, and then plaintiff appealed.

*Paul*, Advocate-General, for Appellant. Baboo *Unnasaud Banerjea*, with him.

Mr. *C. Gregory*, for Respondent.

January 28,

—  
*Judgment.*  
—

The judgment of the High Court(1) is as follows:—

The circumstances which have led to the commencement of this suit appear very fully from the judgment of *PERCIVAL MORRIS, J.J.*, in a previous suit between Mr. W. *W. Morris*, Manager, on behalf of the present plaintiffs, and Joyram and others, which is printed at length in the paper book. The present suit is undoubtedly framed on the suggestion contained in that judgment. It is, therefore, needless for me to say more than a very few words to introduce our own judgment. The plaintiffs, relying on the declaration of the learned Judge that "the transaction represented by the two deeds is unquestionably a mortgage, and the minors still have, if they come into Court in the proper way, a right to redeem the mortgage," and on the observations which occur a little earlier in the judgment, that "it would have been open to Guru Pershad to furnish sufficient materials, to ask the Court to declare that the mortgage, which the mortgage should stand as security as against the mortgage bond, should be reduced to something below that mentioned in the mortgage bond, and the minors in his place have the like right."

(1) JACKSON and McDONELL, *J.J.*

... brought their suit through the manager of their property to redeem the mortgage, after taking an account; and also for the purpose of taking an account of all monies received by defendants on account of the estate, and all monies justly due to them, with a view to the surrender by the defendants, on receipt of whatever may be found justly due to them, of the bond executed by Mussamut Nidhu Looklain on the 1st November 1866, in favour of Roy Nundiput Mahton.

The defendants answered that the lease under which the property in question was held was not really in the nature of a mortgage, and urged that the declaration in the judgment that there was a mortgage is extra-judicial and not binding on them; but supposing it to be a mortgage, yet the lease would hold good, and the plaintiffs, on judgment of whatever was due, could only be entitled to receive the whole rent reserved, and not to recover the property while the term was unexpired.

The Subordinate Judge considered that the transaction was something more than a mortgage, and he described it as "a temporary alienation absolute." The arrangement in fact was of this nature: The bond of the 1st November acknowledges a sum of Rs. 80,391 to be due, and promises to pay the amount with interest at one per cent. per annum by the full moon of August 1277, and pledges the property till re-payment. The lease, dated 5th November, recites the bond and the necessity of providing for payment, and then grants the property in lease from 1278 to 1294 F., inclusive, to the Mahajun's Cousin Joyram, at a fixed annual rent of Rs. 20,451, of which it is stipulated that Rs. 16,500 shall be paid towards principal and interest of the bond debt, and that the balance Rs. 4,041 to the lessor. Everything accruing beyond the fixed rent is to be enjoyed by the lessee.

This is unquestionably, as observed by the Subordinate Judge, a contract which the parties were perfectly competent to make so far as the mere terms of the contract are concerned. The defendants have given consideration for it, and are entitled to the benefit of it, unless for any other reason it is invalid. The Subordinate Judge thinks it is not a mortgage, and, therefore, will open it, being apparently of opinion that, as contended

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 JOOMNA  
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 MAHTO.  
*Judgment.*

by defendants, the observations of the learned Judges of this Court were extra-judicial; but we think they cannot be so regarded. They are, in our opinion, clearly a part of the judgment. Indeed, it is a part of the reasoning on which they base their refusal to give the plaintiff, in the suit then before them, the relief which he sought. It may be that, for some reason not apparent to us, the bonds of formality have been tightened a little beyond what was necessary, considering that the parties affected were minors; but the Court more clearly held that they had a right still to proceed to redemption, and assign that as a reason for refusing to convert the suit then before them into a redemption suit; and it is clear that but for a defect in the frame of the suit, which the learned Judges considered incurable, they would have dealt with it as a redemption suit. We must hold that it was not competent to the Subordinate Judge, and that it would not be right for us, to treat this deliberate declaration as extra-judicial. The effect of the previous decision, we take it, is that the bond with the mortgage and the lease were valid, assuming the account to be correct; and it seems to us that, as the law now stands, the mortgage and the lease are separable and separate.

It was remarked by the learned Judges that, in the first suit, the Court had no materials before it on which it could be decided that the deeds could be altogether set aside, or on which the sum stated in the bond could be reduced; nor have any such materials been furnished in the present suit, nor even is the nature of the plaintiff's imputations particularized. They merely make assertions of the vaguest kind, offer no evidence in support of them, give no instances, and place their whole reliance on a petition for leave to examine the defendants' books; so that it is sought to establish, out of the defendants' own accounts, an allegation of misappropriation and the like, which is not merely altogether unsupported by any proof in the plaintiffs' side, but actually unspecified. This appears to us inadmissible and unreasonable. The plaintiffs, therefore, laid no foundation for a decision that the principal amount stated in the mortgage bond ought to be reduced. It would be doubtless competent to them to pay off the principal with the stipulated interest (or so much as remained due after credit of the yearly payments) out of the rent; but this would

not terminate the lease, and the defendant would be still at liberty to retain the mehals with the profit accruing over above the rent reserved, which rent would of course be payable in full to the plaintiffs after redemption of their pledge.

So far we think the judgment of the Court below must be modified, but we cannot grant the rest of the appellant's prayers. Under the circumstances, we think there should be no costs of this appeal.

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PRESHAD  
SOOKOOL  
v.  
JOYRAM LALL  
MAHTO.  
Judgment.

[CIVIL APPELLATE JURISDICTION.]

PURNO CHUNDER ROY AND OTHERS . . . PLAINTIFFS; February 5.

AND

SADUT ALI AND ANOTHER . . . DEFENDANTS.

*Enhancement of Rent—Building lands—Land let for Building purposes.*

A suit for enhancement of rent, in pursuance of a notice to pay the enhanced rent or quit the land within three months, cannot be maintained where the land in question was originally let by the ancestor of plaintiffs to the ancestor of defendants for building purposes.

**SPECIAL APPEAL** from a decree passed by the Subordinate Judge of Hooghly, affirming that of the Moonsiff of Howrah.

This was a suit for enhancement of rent in pursuance of a notice, which declared that the defendant must, within three months, pay the increased rent demanded, or quit the land and remove all buildings standing thereon. The land was situate within the limits of the town of Howrah, and had on it a *pucca* dock, a screw house and other buildings. It was found that the land had been originally let for building purposes. The suit was dismissed in both the lower Courts. Plaintiff then brought this special appeal.

Baboo Rash Behary Ghose, for Appellants.

Baboo Umbica Churn Bose, for Respondents.

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PURNO  
CHUNDER  
ROY  
v.  
SADUT ALL.  
—  
*Judgment.*  
—  
BIRCH, J.

The following judgments were delivered by the High Court(1):—

BIRCH, J. :—

We think that this suit cannot be maintained in its present form. It is found by both the Courts that the land was originally let for building purposes, and the provisions of Act VIII of 1866 regarding enhancement do not apply to such a case. If the defendants are not entitled to remain upon the land, and the plaintiff is anxious to evict them, or vary the terms of the contract upon which they hold possession, he has his remedy; but he cannot succeed in a suit framed as this is. We dismiss the special appeal with costs.

MITTER, J. MITTER, J. :—

I am also of the opinion that the suit in its form cannot succeed. The special appeal must, therefore, be dismissed with costs.

(1) BLACK and MITTER, J.J.

## [CIVIL APPELLATE JURISDICTION.]

PRAN NATH SANDYAL AND OTHERS . . . DEFENDANTS ;  
 AND  
 RAM COOMAR SANDYAL AND OTHERS . . . PLAINTIFFS.

1878  
 March 15.

*Duty of Appellate Court—Trying different Suits together—Evidence—  
 Rent Suit—Intervenor—Res Judicata.*

A sued B for rent, making C a defendant; the suit was dismissed and A appealed. Then C sued B for rent; A intervened and was made a defendant; a decree was passed in favour of C, and A again appealed. On appeal the Subordinate Judge tried both suits on the same evidence, though there was evidence in the second case which was not before the lower Court on the hearing of the first: *Held*, that he should have recorded his reasons for doing so; but that the judgment would not be set aside on that ground, it not appearing that the party taking the objection had been prejudiced, or that it had been raised before the Subordinate Judge.

In a suit by plaintiff for arrears of rent against one set of tenants, defendant intervened, claiming a moiety of the whole estate. His claim was dismissed in the lower Courts, and the case came up on special appeal. Meanwhile plaintiff brought suits against another set of tenants on the same estate, in which defendant again intervened on the same ground as before: *Held*, that the decision in the former set of cases, unless and until set aside in special appeal, was binding on the intervenor, even though the estate was of such value that the Court which passed the decrees in the rent suits would not have jurisdiction to try the title which was in dispute.

**A**PPEALS under section 15 of the Letters Patent from decrees passed by Mr. Justice LAWFORD and by Mr. Justice AINSLIE.

Ram Coomar Sandyal and Ramjoy Sandyal were two uterine brothers. Ramjoy had one son named Ram Gobind, who died in 1268, leaving three sons, Pran Nath, Keder Nath, and Mohima Chunder. In 1281 Pran Nath, claiming on behalf of himself and his minor brothers a moiety of the rents of certain mohals which stood in the name of Ram Coomar, sued six of the tenants for an 8 annas share of the rent due from them, making Ram Coomar a defendant. The Moonsiff, treating the suits as rent suits merely, dismissed them, and Pran Nath appealed to the Court of the

1878  
 PRAN NATH  
 SANDYAL  
 v.  
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 SANDYAL.  
 Statement.

Subordinate Judge. Meanwhile Ram Coomar sued the same tenants and another tenant for the whole 16 annas of the rent due from them. Pran Nath intervened in these suits and made a defendant. The question of title to the lands the rent of which was sued for was tried and found in favour of Ram Coomar who got a decree. These seven suits were appealed to the Court of the Subordinate Judge who tried thirteen appeals together, and affirmed the Moonsiff's decision. Pran Nath appealed specially to the High Court.

Meanwhile Ram Coomar brought twenty-five suits for the whole 16 annas of the rent due by other tenants in the same manor. Pran Nath intervened in these suits, making the same claim as before, but plaintiff got a decree, the Moonsiff holding the decision in the previous suits was binding on the parties, the result being the same in every case. Pran Nath appealed to the Subordinate Judge (a different Judge from him who tried the other cases) who went into the whole evidence and decreed in favour of Nath's claim, holding that the decision in the previous cases, which were then on appeal to the High Court, was not binding on the parties. Ram Coomar appealed specially to the High Court.

The special appeals in the first thirteen cases, in which Pran Nath was the special appellant, were dismissed, and he appealed under section 15 of the Letters Patent.

The special appeals in the remaining twenty-five cases, in which Ram Coomar was the special appellant, came on for hearing before Mr. Justice AINSLIE.

Baboo Jogesh Chunder Roy, for Ram Coomar, contended that in both sets of cases the issue raised by the intervenor was one of title, as the issues in the former cases related to the whole mehal, and at this point was then decided in plaintiff's favour, the intervenor must be bound by that decision. He must take the consequences of his uncalled-for intervention. Otherwise there would be conflicting decisions on the same point. Here, one Subordinate Judge found that the plaintiff, Ram Coomar, was entitled to the whole 16 annas share of the rents, and the other Subordinate Judge found to another finding on the same evidence. A third Subordinate Judge might come to quite a different finding. Because the former decision was pending in special appeal was no reason



should be rejected as evidence in these cases. It was a decision of a competent Court, and the Subordinate Judge should have held the parties bound so long as it remained untouched. Even if that decision would not operate as a *res judicata*, it was a good piece of evidence on behalf of Ram Coomar's title under section 13 of the Evidence Act, and as that was the only evidence taken by the Moonsiff on the point whether the property was self-acquired or not, the Subordinate Judge should have afforded the plaintiff an opportunity of proving his case by new evidence. [*Gobind Chunder Kandu vs. Taruk Chunder Bose*, 1 C. L. R., 35; *Mohima Chunder Moorumdar vs. Asradha Dassia*, 15 B. L. R., 251, note.] Further, as the mehals, the rent of which was sued for, stood in the name of the plaintiff only, the Subordinate Judge was wrong in not throwing the onus on the party alleging that these properties were purchased by joint funds—*Denonath Shaw vs. Hurrnarrain Shaw*, 12 B. L. R., 349.

Baboo Sreenath Dass, for Respondent, contended that these suits were against different tenants of the mehals, and the issues in the former suits, having merely decided the title of the holdings of the particular tenants in those suits, they could not operate as *res judicata*.

The Appellant was not called upon to reply.

AINSLIE, J. :—

The Subordinate Judge is in error in supposing that he can try such a suit as this without a complete adjudication of the respective rights of the plaintiff and intervening defendant. It is not a case in which the original defendants had entered into an express contract with the plaintiff, and had obtained possession by virtue of that contract. The plaintiff does not sue on such a contract, and therefore when the question of his title to the patnis within which are the lands cultivated by the defendant arose, and a third party claiming in part adversely to the plaintiff was admitted as a party to the suit and made a defendant, the only issue as between the plaintiff and the added defendant was, whether the former was entitled to the patnis as his separate property or only jointly entitled with the intervening defendant, and this issue had to be fully determined; there is no procedure

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Argument.

AINSLIE, J.

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 ———  
 Judgment.

provided for a summary adjudication subject to revision second suit. In fact, the Subordinate Judge has gone into the question at length, but he has refused to follow a previous decision between the same parties on two grounds: (1) that it is still pending a final decision of the High Court on special appeal; and (2) that this is a suit against a different tenant. In the former suit an intervening defendant was allowed to become a party, and the question whether he was jointly entitled to the patnis claim was decided in favour of the plaintiff as his exclusive property was raised and determined against him. The fact that there is an appeal still pending has been good ground for postponing judgment in this suit, but it is no reason for setting the decision aside as of no authority. So long as it stands unreversed, it is the judgment of a competent Court directly on the issue in a suit between the same parties. As such, it seems to me that the intervenor is effectually bound by it. The point was decided by a Full Bench in *Chunder Kundu vs. Taruk Chunder Bose*. (1) The fact that the rent claimed in this suit is from a tenant other than the defendant in the other suit does not alter the case; the argument was unsuccessfully advanced in the case cited.

If persons will force themselves into suits to which they are not originally parties they must take the consequences. I think the question at issue between plaintiff and the intervenor was fully concluded by the former judgment, and that the lower Appellate Court was wrong in disturbing the Moonsiff's decree.

The appeal be allowed with costs here and in the lower Appellate Court, and the decision of the lower Appellate Court be set aside, that of the first Court being affirmed.

The intervenor appealed under section 15 of the Letters Patent. The appeals in the first set of cases came on at the same time, and both were heard together.

- *Evans*, for the Appellant, argued that what the Moonsiff decided in these last suits was to decide indirectly a question of title to property worth more than Rs. 50,000, which he had no authority to do directly, in a suit of a few annas, and to

(1) Reported in 1 C. L. R., p. 35.

parties bound by that decision, would be to deprive parties of a Regular Appeal to the High Court in such cases. He contended that the decision of Mr. Justice AINSLIE should be set aside on the ground that the point of *res judicata* was not taken in the grounds of appeal in the Court below. He had no objection to the rent decrees being allowed to stand, but he would ask for a declaration that they should not be a bar to a subsequent regular suit.

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SANDYAL.  
Judgment.  
AINSLEE, J.

Baboo Jogesh Chunder Roy, Baboo Kally Mohun Dass and Baboo Nullit Chunder Sen, for the Respondent, were not called upon.

The judgment of the Court (1) is as follows :—

If we saw sufficient reason for adopting the course which the learned Counsel for the appellants has urged upon us, viz., to send back these cases for re-trial to the Court below, we should do so; but we think that in fairness to the successful party we ought not to take this course, because we believe that the decision arrived at by the Court below is correct and just.

The first set of cases, six in number, were tried by the Moonsiff on a wrong principle. He thought that he had a right to disregard altogether the case of the defendant No. 2, and to adjudicate only as between the tenant (the defendant No. 1) and the plaintiff; but the defendant No. 2 was made a party to the cause by the plaintiff himself. It is not as if he had intervened of his own accord, though even then the Moonsiff would have been bound to adjudicate upon his claims. But here, the plaintiff brought him into the suit for the very purpose of contesting with him the right which he claimed. That being so, the Moonsiff was manifestly wrong in ignoring this defendant and dealing with the suit, only as between the plaintiff and the defendant No. 1. These cases then went on appeal before the Subordinate Judge; but in the meantime the second set of suits, seven in number, had been brought by Ram Coomar Sandyal, (the defendant No. 2 in the first set of suits), against seven tenants, six of whom were the defendants No. 1 in the first set of suits, to recover from them the entire 16 annas rent; and in those suits the plaintiff in the

(1) GARTH, C.J., and BIRCH, J.

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 SANDYAL.

*Judgment.*

first set, who claimed the 8 annas share of the rent, intervened and was made a defendant. The Moonsiff who tried this second set of suits, (a different Judge from the first) decided in favour of the plaintiff. These cases also went in appeal before the same Subordinate Judge before whom the first six cases were pending; and the appeals in those seven suits were heard and determined first. The Subordinate Judge confirmed the Moonsiff's judgment in those cases; and he then went on to deal with the first set of cases, (we have no doubt with the consent of the parties) upon the evidence and materials which he had before him in the other seven cases. It is not suggested that, if the first set had been tried first, the appellants would have had better or other evidence to bring forward, or would have been able to improve their case in any way; and the Subordinate Judge, very naturally, thought it best to deal with both sets of appeals on the same evidence without remanding them. The only point of form that he neglected was to record the reasons why he so dealt with the matter, and the fact that he did so by consent of the parties; but this was an irregularity on his part, and not one of those errors which could affect the proper investigation of any of the cases upon the merits. It is true that the point is taken in the grounds of appeal, where it is said that the Subordinate Judge was wrong in deciding the appeals upon evidence that was not before the Moonsiff; but it is not pretended that this point was taken before the Subordinate Judge. There is, therefore, no ground for sending these cases back for re-trial. In the next seven cases it is sufficient to say that we entirely agree with the learned Judge of this Court Mr. Justice LAWFORD.

In the remaining twenty-five cases we also think there is no ground for impugning the judgment of this Court. It is argued that the learned Judge ought not to have admitted the plea of "*res adjudicata*," because it was not distinctly raised in the grounds of appeal. But it was in his discretion to entertain it or not; and we cannot say that in doing so he exercised his discretion improperly. There is no doubt that in the second set of cases, which were tried before the Moonsiff, the self-same title was in issue and adjudicated upon between the same parties as in this last set of cases; and that the whole question between the parties in a

suits depended upon that one issue. In the Full Bench case of *Gobind Chunder Kundu and others vs. Taruk Chunder and others*, 1 C. L. R., 35, we held that if in a rent suit, a third party intervened, and a question of title was raised as between him and the plaintiff, upon which the whole case depended, he must be bound by the decision of that question, and could not raise it again in any subsequent suit. We consider ourselves bound by the ruling in that case; and the whole of the appeals will, therefore, be dismissed with costs.

1878

[CIVIL APPELLATE JURISDICTION.]

GHOLAM ALI CHOWDHRY . . . . . PLAINTIFF;      *January 20.*  
AND  
THE COLLECTOR OF BACKERGUNGE } DEFENDANTS.  
AND OTHERS . . . . . }

*Alluvion and Diluvion—Re-formation on old site—Chur Land.*

Plaintiff bought a certain chur, situated between two branches of a river, from the Government; the sale notification stating that the chur contained a certain area and was subject to a certain *jumma*. It appeared that at a former time the chur had been much larger and extended over a site afterwards covered with deep water, but on which, and before the plaintiff's purchase, new land had formed by accretion to the opposite side of the channel. In a suit for possession of the newly-formed land on the ground that it was re-formation on an old site: *Held*, that what the Government sold and what plaintiff bought was the chur as it existed at the date of the purchase.

*Gunga Narain Chowdhry vs. Radhica Mohun Roy*, 21 W. R., 115, cited and distinguished.

REGULAR APPEAL from a decree passed by the First Subordinate Judge of Backergunge.

The facts of this case may be stated as follows: The River Khan ran from north to south to a certain point where it divided into two branches, one running south-east and the other south-west. The chur Jahapur lay in the fork between the two branches, and the Mehal Heshamaddi between the main river and south-east branch. This was the position of the land in the

1878 year 1849. In 1871, the south-east branch of Ariel Khan  
 GHOLAM ALI changed its positions. By a slow rotatory movement, as it  
 CHOWDHRY round the point where it branched off from the main stream  
 D. had, in the space of twenty years, assumed a position almost  
 THE a direct line with the main river, and like it ran from north  
 COLLECTOR OF to south. The suit was brought by the plaintiff to recover  
 BACKER- land included between the new and old positions of the  
 GUNGE. east branch, on the ground that it was land which had re-  
 formed on the old site of his chur Jahapur.

Statement.

Up to the year 1871 chur Jahapur had been a khas of the Government. On the 21st of March 1871, the Government inserted a sale notification in the *Calcutta Gazette*, which stated that the Government proprietary right in chur Jahapur, containing 3,994 acres more or less, and subject to a sudder jumma of Rs. 5,000, would be sold, and that the purchaser's right to accrete from the commencement of the Bengali year 1278. Pursuance of the above notification, the chur was sold and the plaintiff became the purchaser. The suit was instituted on the 1st of August 1874. The lower Court held that a part of the land claimed was land which had re-formed on a site, which is a re-formed part of plaintiff's purchase, but had in the meantime been covered with water; and plaintiff got a decree for that part. The rest of the claim was dismissed and plaintiff appealed.

*Evans*, for the Appellant. With him Baboo Doorga Mohun, Baboo Ananda Proshad Banerjee, and Baboo Kally Mohun for the Respondent.

The judgment of the High Court (1) was delivered by

WHITE, J. WHITE, J. :—

The plaintiff, who is the appellant before us, sued to recover possession of about 2,500 beegahs of land, which is stated in his plaint to be an accretion to a certain chur which he had purchased from Government in 1871. His claim, however, is really in respect of an accretion, but in respect of a re-formation on the alleged old site of the chur; for a wide stream separates the land claimed from the chur in question.

(1) WHITE and MITTER, J.J.

The First Subordinate Judge has found that out of the 2,500 beegahs claimed in the plaint, 2,271 beegahs 5 cottahs 7 dhoors have been identified as having at some former time or times been part and parcel of the chur, and of these 2,271 beegahs 5 cottahs and 7 dhoors he has decreed possession to the plaintiff of 172 beegahs 6 cottahs and 16 dhoors, on the ground that they are shown by the evidence to have re-formed on the site of land which at the date of his purchase formed a part of the chur, but as regards the remainder, being 1,498 beegahs 18 cottahs and 11 dhoors, the Subordinate Judge has dismissed the plaintiff's suit. No appeal has been preferred by the defendants against that part of the decree which is in favour of the plaintiff, but the plaintiff has appealed against that part of the decree which disallowed his claim to the 1,498 beegahs 18 cottahs and 11 dhoors.

It appears that in March 1871, the plaintiff, in the name of one Mohamed Hanif, purchased from Government, for Rs. 10,100, a chur, subject to an annual rent, with road cess, of Rs. 5,000. In the certificate of sale, which is dated the 6th of May of that year, the property purchased is described as the proprietary right of the Government in the undermentioned mehal, and the mehal is mentioned in a tabular statement at the foot of the certificate as being the Towjee No. 4688, the name Jazira chur Jahapur, and subject to an annual jumma payable to Government in the shape of rent and road *kurcha* amounting altogether to Rs. 5,000.

The question in the suit is, what did the Government sell to the plaintiff, and what did the plaintiff buy from the Government in March 1871. The contention of the Government is, that the land which the plaintiff bought was the chur in its then existing condition as regards size and area, with the right to any natural accretions of land that might thereafter accrue to the chur and some part thereof. The contention on the part of the appellant is that he bought not only all that, but also the right to any land which might thereafter re-form near the chur, and which he could have re-formed on a site that at any time before his purchase belonged to, and formed part of, the chur. The mehal which the plaintiff bought was put up for sale under a proclamation, which is dated the 21st March 1871, along with other mehals which the Government had determined to sell. The proclamation

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GHOLAM ALI  
CHOWDHRYv.  
THE  
COLLECTOR OF  
BACKER-  
GUNG.

Judgment.

WHITE, J.

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 GROJAN ALI  
 CROWDNEY  
 v.  
 THE  
 COLLECTOR OF  
 BACKER-  
 GUNGE.

*Judgment.*

WHITE, J.

or notification is to the effect that the proprietary right which the Government had in these mehals would be sold subject to certain conditions. Appended to the notification is a description of the mehals. The one which the plaintiff subsequently bought is described as bearing the Towjee No. 4688, and the name Jazira chur Jahapur, and as containing an area of 3,994 acres more or less, and liable to the payment of a sadder jumma including road cess of Rs. 5,000; and it is further stated that the purchaser's right would accrue from the 1st of Bysack 1278, B.S. It is clear from this that the chur in its then existing condition is represented as containing about 3,994 acres. The plaintiff contends that this statement of the area is in no way limited to the quantity of land to which he became entitled by virtue of his purchase and he seeks in this suit to make out his right to 1,498 beegahs and a fraction of land beyond the 3,994 acres mentioned in the notification, by putting in evidence a *thak* map of the chur which was made by the authority of Government in March 1859, some eleven years before the date of his purchase. This *thak* map represents the chur as bearing the Towjee No. 456<sup>2</sup>, which is a different Towjee No. from that borne by the mehal which the plaintiff bought in 1871, and as containing a much larger area than 3,994 acres. Of the land which has re-formed near his mehal, having identified 1,498 beegahs by means of the *thak* map and shewn that it formed in 1859 part of the larger area, he claims by virtue of his purchase to recover the same.

I am of opinion that the lower Court is right in disallowing this claim. The history of the chur, as gathered from the rubokarees which have been produced by the defendant, who represents the Government, shows that the 1,498 beegahs were never part or treated as forming part of the mehal which the plaintiff purchased, and that they had both emerged and become submerged some time during the interval which had elapsed between a measurement of the chur which was made by the Collector's order in 1847, and another measurement of it which was made by similar order in 1867. It appears from these rubokarees, which are dated respectively the 20th of June 1867 and the 19th of September 1870, that this chur first appeared in the River Ariel Khan in the year 1835; that it was separated



from the river banks on either side by an unfordable channel, and was consequently claimed by Government as its property; that proceedings were taken for the purpose of asserting that claim, and on the 18th of September 1835, the chur was declared to be Government property by an order which was finally confirmed on the 29th December 1838. In April 1839, the Deputy Collector was ordered to make a settlement. The chur was then for the first time surveyed at the instance of the Collector, and found to contain 185 dhoors and a fraction. A settlement was first made for twenty years from the 1st of May 1840 at a *russudi* or progressive jumma. That settlement came to an end before the date fixed for its expiration, and on the 29th June 1847, the chur was again measured at the instance of the Collector and found to contain 124 dhoors and a fraction. A new settlement was made for twenty years to expire in 1866-67. Shortly before the expiration of the term, another measurement was made at the instance of the Collector, when it was found that the chur had decreased in size from the time of the last measurement in 1847, and that, whereas in 1847 its area was 13,528 beegahs 15 cottahs and 12 chittacks, its area was only 11,349 beegahs 15 cottahs and 4 chittacks in 1867. A settlement was then made for seven years with one Bango Chunder Shaha at a jumma of Rs. 9,240. That settlement, however, was afterwards set aside, and the chur put up for sale on the 16th of September 1868, but no bid being made for it, it was in the same year settled with the old ijaradar's heirs at a jumma of Rs. 9,240, but subject to be reduced if the land was found to be deficient on a future survey. In 1869 a fresh survey was made by the order of the Collector, when its total area was found to be 12,104 beegahs 5 cottahs and 8 chittacks, which is equivalent to 3,994 acres. The jumma fixed upon the basis of this area was Rs. 9,115 4 annas and 8 pies. On the 12th of February 1869, the Collector suggested to the Revenue Authorities an alternative course, either that the chur should be advertised for sale at the jumma determined with reference to the then condition of the chur, or that a settlement should be made for a long time, in which there should be a provision for deduction on account of diluviation. (See page 32 of the printed book). The authorities assented to the chur being

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advertised for sale, as suggested by the Collector, but before the order for sale came, a proclamation for settlement had been issued. On that occasion one offer to accept a settlement was alone made, and that only at a reduced jumma of Rs. 5,000. The Collector closed with this offer, and granted an ijara or lease of the chur for one year, namely, the year 1870, at the reduced jumma. The authorities sanctioned the settlement for that year, but directed the property to be put up for sale at the reduced rent of Rs. 5,000 inclusive of road *kurcha*, and accordingly the proclamation or notification which I have mentioned above, issued.

These proceedings of the Collector show that the chur had since its formation been four times measured by the orders of the Collector, and that on each occasion the area of the chur had varied. At the last measurement its contents were found to be 3,994 acres, which is the quantity of land more or less stated in the proclamation of sale, under which the plaintiff purchased. These proceedings also show that after each survey the chur was settled temporarily with different persons at varying rents, which were on each occasion calculated with reference to the area which was found at each measurement to be contained in the chur. The settlement immediately preceding the plaintiff's purchase was at a reduced jumma, including road cess of Rs. 5,000, which is the jumma including road cess to which the mehal purchased by the plaintiff is now subject. It also appears from the rubokara that no measurement was made of the chur between the years 1847 and 1867. Hence the larger area which was found to exist at the *thak* measurement in 1859, must have been caused by an accretion of land to the chur which had taken place after 1847 and been swept away before 1867. No settlement was made by the Collector between the years 1847 and 1867, nor could be made for the chur was then in the occupation of an ijardar, to whom the Collector had let it for 20 years, commencing from 1847, at rent on the area as found by survey made in that year. It is clear that the 1,498 beegahs now claimed by the plaintiff were never surveyed or settled by the Collector; nor was any revenue paid or claimed by Government in respect of the same. Having regard to the history of the chur as disclosed by these rubokaras and the description of the property as contained in the procl

## [CIVIL APPELLATE JURISDICTION.]

1878  
February 5.

MAHOMED ARSHAD CHOWDHRY . . . DEFENDANT  
AND  
SAJIDA BANO . . . PLAINTIFF.

*Mahomedan law—Mahomedan widow—Return—Exclusion of the Crown*

When a Mahomedan dies leaving no residuary heirs, but only a widow surviving, she is entitled to the return to the exclusion of the Crown.

*Mussamut Hurmutunnissa vs. Alahdeah Khan*, 17 W. R., 1  
*Mussamut Soobhanee vs. Bhetun alias Shah Azim Ali*, 1 Select Rep.,  
(464, New Ed.), cited.

**REGULAR APPEAL** from a decision passed by the Subordinate Judge of Sylhet.

Nawab Ali Chowdhry, the husband of the plaintiff, died in 1284, leaving no heirs in blood surviving him. The defendant took possession of the property claiming as heir to the deceased, whereupon plaintiff brought a suit for possession of the property worth sixteen annas. The defendant's claim was found to be false; then the question arose whether the widow was entitled to the return.

*J. D. Bell*, Moonshee Mahomed Yusuf, and Moonshee Saheb Islam, for the Appellant.

Mr. C. Gregory, and Baboo Joy Gobind Shome, for Respondent.

The judgment of the Court (1) is as follows:—

It is admitted by the defendant that the plaintiff, as widow of the late Nawab Ali Chowdhry, is entitled to a four annas share, but it was at first alleged by him in his written statement that she was in possession of that four annas share. That contention was subsequently abandoned in the course of the argument by the learned Counsel who appears for the appellant, and it is admitted that the plaintiff has been dispossessed even of the share to which she is by the admission of the defendant entitled under Mahomedan law. That brings us to the question raised.

(1) KEMP and MORRIS, J.J.

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( )

Lectures on Mahomedan Law. We, therefore, think that the weight of authority is in favour of the plaintiff's contention. As the widow of Nawab Ali Chowdhry, is entitled to the return of the exclusion of the defendant who has failed to establish his title as kinsman under the Mahomedan Law. We, therefore, hold with the Subordinate Judge that the widow is entitled to the return.

[CIVIL APPELLATE JURISDICTION.]

February 14. MOOKTO KESHEE DEBEE AND OTHERS . . . DEFENDANTS

AND

ANUNDO CHUNDER CHATTOPADHYA } PLAINTIFFS  
AND OTHERS . . . . . }

*Evidence—Admission of Signature—Proof of Title Deeds—Onus of Proof in Benames transactions—Declaratory Decree.*

When defendants admitted the execution of a document purporting to be a conveyance by them of certain land to the plaintiff for valuable consideration, but contended that the deed was not intended to have any effect, and was merely a *benames* transaction: *Held*, in favour of a declaration of his right by a plaintiff in possession of the land, that, under the circumstances of the case, the onus was on the plaintiff to show that the deed was what it appeared to be, and not a mere *benames* transaction.

**SPECIAL APPEAL** from a decree passed by the Official Judge of Furreedpore, reversing that of the Moonsiff of Furreedpore.

Baboo Doorga Mohun Dass, for Appellants.

Baboo Tarucknath Palit, for Respondents.

The facts of the case are sufficiently set forth in the judgment of the Court (1), which is as follows:—

In this case the plaintiffs seek to obtain a declaration of their right to the properties in dispute, with a view to have their names registered in the Collector's rent-roll, the Revenue Court.

(1) BIRCH and MITTAR, J.J.

having refused their prayer for registration of their names. They allege that they purchased the disputed properties in Kartick 1275 (October 1869), and have been in possession of them since that time. The defendants deny the transfer. They allege that the *kobala* set up by the plaintiffs was merely a *benamsee* transaction, and the possession of the lands in suit was with the plaintiff for the purpose of liquidating certain debts due to the latter. The Moonsiff dismissed the suit, holding that the *kobala* set up by the plaintiffs was not a real transaction. The District Judge, reversing this judgment, has decreed the claim.

The District Judge thinks that, as the defendants admit having put their signatures to the document upon the basis of which the suit has been brought, the onus of establishing that this was merely a *benamsee* transaction is upon them. In this we think he is wrong. The Revenue Courts have refused the plaintiffs' prayer for registration of their names. They have, therefore, brought this suit to obtain a declaration of their rights. The defendants impugn their title deed, upon which they have brought this suit, as a mere paper transaction. Under these circumstances, it is for the plaintiff to establish by affirmative evidence that the *kobala* represents a real transaction. There is, therefore, this clear error of law in the judgment of the Appellate Court.

But it has been contended before us on behalf of the respondents that, notwithstanding this error of law, the decision of the lower Appellate Court ought not to be disturbed, inasmuch as the District Judge has also upon the evidence found that the *kobala* is a real transaction. We, however, for the reasons mentioned below, think that the error in question is likely to have affected the merits of the decision. First, because the District Judge has omitted to consider a very material question in the case, viz., the character of the plaintiffs' possession. It is admitted that for some time they were in possession. The defendants allege that they were in possession not as purchasers, but for the purpose of realising debts due to them; the Moonsiff decided the question in favour of the defendants. He refers to an admission of one of the plaintiffs, and to their conduct generally, to support his view. The District Judge, we think, is in error in holding that this question is immaterial. Secondly, because the

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v.  
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CHUNDER  
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—  
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—

District Judge has not also duly considered another important question in the case, viz., whether the alleged consideration for the *kobala* is adequate or not. The Moonsiff in this instance also decided in favour of the defendant. In connection with this matter we may notice here that the recital in the *kobala* in question, viz., that Rs. 460 were paid to the vendors, is admitted to be not correct. As regards the consideration, the case which the plaintiffs have attempted to establish is this: They say that on an adjustment of accounts, it was found that Rs. 2,100 were due from the defendants and their co-sharers to themselves. The defendants and their co-sharers, on the date of the *kobala* executed a *kistibundee* for Rs. 1,700, the balance Rs. 400 being deducted as the consideration for the alleged sale. Having regard to the fact that this is not what is stated in the *kobala*, it is essentially necessary for the plaintiffs to establish it by clear and unimpeachable evidence. We think that the plaintiffs cannot succeed without establishing this part of their case. The District Judge has, therefore, omitted in this instance also to consider a question of vital importance. For these reasons, we are of opinion that the decision of the lower Appellate Court ought not to stand, and reversing it accordingly, we remand this case to the Court for re-trial. Costs to abide the result.

## [PRIVY COUNCIL.]

GREEMUTTY UMA DAYEE . . . . . PLAINTIFF;  
 AND  
 SOKOOLANUND DAS MAHAPATRA . . . . . DEFENDANT.

1878  
 February 5.

Act XXVII of 1860—Grant of Certificate—Hindoo Law—Benares School—  
 Adoption—Omission to adopt a Brother's son.—*Factum valet*.

The effect of granting an application for a certificate under Act XXVII. of 1860, made by a person claiming as adopted son of the deceased, is, as regards the parties to the proceedings, at most to confirm or put the applicant in possession of the property as heir, until displaced by a decree in a regular suit.

Under the Hindu Law, as it obtains in Benares, a maiden daughter is, in default of a natural or adopted son, entitled to succeed to the property of her deceased father in the first instance; failing her, the succession devolves on the married daughters who are unprovided for, to the exclusion of the wealthy daughters. In default of unprovided daughters, the wealthy daughters are competent to inherit; but no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.

Under the Hindu Law, as it prevails in Benares, the omission to adopt a brother's son is not an objection, which at law invalidates an adoption otherwise regularly made, especially after years of recognition in the family, even though the person adopted is not a *sapinda* of the adoptive father.

*Ooman Dutt vs. Kunhia Singh*, 3 S. D. A. (Sel. Rep.), 141; discussed.

The maxim "*Quod fieri non debuit factum valet*" is recognized by the law of the Benares school, though not in the same degree as in Bengal.

*Chinna Gaundan vs. Kumara Gaundan*, 1 Mad., 54; *Rai Vyakratav Anandrov Nimvalkav vs. Javavantrav bin Matharav Ranadive*, 4 Bom. A. C., 191; *Raja Opendur Lall Roy vs. Bronomoyes*, 10 W. R., 347; 1 B. L. R., 231, cited.

APPEAL from a decree passed by the High Court of Calcutta, reversing that of the Subordinate Judge of Cuttack.

This was a suit brought by Mussamut Uma Dayee against Skoolanund Das and Parbutty Dayee, the sister of the plaintiff, for the possession of certain zemindarees admitted to have been the property of plaintiff's father, and which, at the time of instituting the suit (June 22nd 1872) were in the possession of

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*Statement.*

Gokoolanund. The plaint states that Hulodhur Das Mahapa the father of the plaintiff, died on the 25th of Aughran 1 Amli (8th of December 1870) leaving surviving him the plain who was an indigent childless widow, and the defendant Parbur who was in affluent circumstances. That after his death Goko nund falsely representing that he was the adopted son of Hulodh obtained a certificate under Act XXVII. of 1860, and t possession of the properties. Plaintiff claimed to be the new heir to her father under the Mitakshara law. The defend Parbutty in her written statement alleged that her father a allowed maintenance to the plaintiff as she was a childless wid that she herself had her husband and sons but was in indig circumstances; and she claimed to be entitled to possession of properties as the nearest heir of her father. She also alleged Gokoolanund was not the adopted son of Hulodhur Das. defendant Gokoolanund stated that he had been adopted Hulodhur before the birth of the plaintiff; that for twenty years he had, to the knowledge of the plaintiff, managed affairs of the zemindarees; and he charged that the suit brought by the plaintiff at the instigation of one Hurihur the grandson of an elder brother of Hulodhur.

The Court of First Instance settled the following issues: whether the suit was barred by limitation; (ii) whether the defendant Gokoolanund was adopted by Hulodhur Das; whether such an adoption, if it did take place, could be held and valid under the Hindu law, and whether it would Gokoolanund to succeed to the deceased's estate and effects; should either the second or third issue be decided in the neg then, (iv) which of the two daughters of the deceased is the indigent? He found that the claim was not barred by limit that the adoption had not taken place; that, even if it had, it be invalid, as Hulodhur had at the time a nephew, Dinobur living; and that of the two daughters the plaintiff was the indigent, and therefore he gave her a decree as claimed. appeal to the High Court of Calcutta, this decision was reversed by MACPHERSON and PONTIFEX, J.J., on the 8th of March. The judgment of the Court will be found reported in 23 V 340; 15 B. L. R., 405.



the plaintiff appealed to the Privy Council, when their Lordships (1) delivered the following judgment:—

The general question raised by this appeal is who was entitled to succeed to the estate of one Hullothur Dass Mahapatra, an old Brahman, who died in December 1870. He left by his will Jumoona, who predeceased him some four years before that, two daughters—Uma Dayee, the plaintiff in the cause, and Parbutty Dayee. Both had been married, but Uma Dayee was a widowed widow, dependent upon and living with her father at the time of his death, whilst Parbutty was and is living with her husband, a man of some substance, by whom she had had children living. He also left the defendant Gokoolanund Dass, who was adopted to be his son by adoption.

In January 1871, the last named person applied to the Judge of the District for a certificate under Act XXVII of 1860. His claim was resisted by Parbutty, who disputed the adoption, and also by Hullothur Persad Dass, the great-nephew of the deceased. The Judge held that the latter had no *locus standi* as an objector; and between Parbutty and Gokoolanund, decided that the latter had *de facto* established his title as the adopted son of the deceased, and granted the certificate to him. Uma Dayee was no party to the proceeding, of which the effect was at most to confirm or to disconfirm Gokoolanund in the possession of the property as the heir of Hullothur, until displaced by a decree in a regular suit.

In June 1872, Uma Dayee instituted the present suit against Gokoolanund and Parbutty, seeking, as between herself and the defendant, to be declared the preferential heir of their father, and, in the event of the adoption of the former, to recover the estate from him. The questions raised in the cause are determinable by the law of the Bengal School. That law, in so far as it supports the claim of the plaintiff to succeed to her father's estate in default of a son, natural or adopted, is thus laid down by Sir William Macnaghten ("Principles and Precedents of Hindoo Law," p. 22.) In stating the rule of the Bengal school, he says: "But there is a difference in the law as it obtains in Benares on this point, the Bengal school holding that a maiden is in the first instance entitled

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to the property; failing her, that the succession devolves the married daughters who are indigent, to the exclusion the wealthy daughters; that in default of indigent daughters the wealthy daughters are competent to inherit; *but no preference is given to a daughter who has, or is likely to have, an issue, over a daughter who is barren or a childless widow.*" Not addressed to their Lordships at the Bar induces them to think that this is an incorrect exposition of the law. Mr. Arath indeed, in support of his contention that the plaintiff had whatever right to inherit her father's estate she would otherwise have possessed by reason of her being a childless widow, relies upon some passages in the "Smriti Chandrika" (Chapter xiv, section 21, paragraphs 21 and 28), in which the author of that treatise adopts and affirms the rule of the Bengal school in regard to the disqualification of a barren daughter. But on these passages it is sufficient to observe that, according to Mr. Colebrooke and other high authorities, the "Smriti Chandrika" contains an authoritative exposition of the law as it prevails in the South of India, and consequently that the passages in question are of no weight when set against the propositions of Sir William Macnaghten has deduced from the text of the Mitakshara and other authorities recognized by the Bengal School. That the plaintiff, as compared with her sister, is indigent, or, in the words of the Mitakshara, "an unprotected daughter," seems to be clear. Their Lordships, therefore, in the view which they take of the other issues it is not necessary to affirm her title as against her sister conclusively, will allow that she has shown a sufficient title to maintain this suit against the defendant Gokoolanund, and to put him to proof of his adoption.

Two distinct issues have been raised touching this adoption. 1. Whether it was ever made in fact; 2, whether, if so made, it is good in law. And as to the first issue it is to be remembered that the plaintiff has not been content to rely on any defect in the proof of the defendant's case. She has set up, and taken to prove, a substantive case of her own.

The case of the defendant is, that he was by birth the son of Nath Das, a distant kinsman of Haldobur Das.

a very tender age he was taken into the house of Hullothur in a view to his being adopted ; that when about 5 years old, in the year 1837, he was formally given by his natural, and received by his adoptive father, in adoption with the requisite ceremonies ; that he was brought up and educated by Hullothur as his adopted son, receiving from him at the proper age the initiation of the Brahminical thread, and being on a subsequent occasion given in marriage by him ; that after he reached man's age he continued to be recognized in the family as the adopted son, and took part in the management of its affairs ; and that in the character of adopted son he performed the funeral ceremonies of Jumoonah, and afterwards of Hullothur himself.

On the other hand, the case of the plaintiff is that the defendant is not the son of Nath Das ; that he was by birth a Kanonj Rajman, or other native of the North-Western Provinces ; that when young he was brought by the other pilgrims to Juggunah, and left at first in a sort of hospice attached to the temple which belonged to the elder brother of Hullothur ; that he afterwards lived in the house of one Hira, who is stated to have been a concubine of Hullothur ; that he was never on terms of consanguinity with Hullothur ; that he never was, and, being the son of an unknown father, never could have been adopted by Hullothur ; that it was only as a gomastah or dewan that he ever took part in the management of Hullothur's affairs ; that Hullothur, some years after the alleged adoption, really adopted one Radhakrishna, a son of one Bhika Das, who subsequently died ; and that Hullothur's funeral rites were performed by the plaintiff and the persons authorized by her to do the acts which a female cannot herself do.

Their Lordships might feel it difficult to pronounce with confidence for themselves which of these conflicting statements, supported as each is by the testimony of numerous witnesses, and in a greater or less degree by documentary evidence, is true. Their difficulty would be greatly increased if one of the Indian Courts had broadly affirmed the truth of the plaintiff's statement, whilst the other Court had pronounced in favour of the defendant. But that is not the way in which the case comes before them. The Subordinate Judge, though he decided against

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the fact of the adoption, did not affirm that the original *etc* and subsequent history of the defendant were what the plaintiff witnesses represented them to have been ; he did not find that Radhakrishna (as to whose adoption the evidence is of the most loose and general character) was ever adopted by Hullothur. He did not find that the plaintiff, and not the defendant, performed the funeral rites of Hullothur. It cannot, therefore, be said that the Judge before whom they were examined has pronounced the plaintiff's witnesses to be worthy, and the defendant's witnesses to be unworthy, of credit. On the contrary (giving, perhaps, a little more weight to some supposed admissions by two of the plaintiff's witnesses than their words warrant), he expressed his belief "that the defendant Gokoolanund had for years lived with, and been brought up, and treated as a son, and married by Hullothur." He held "it also to be clear from the evidence tendered for the defendant that the defendant had frequently been acknowledged by others as the adopted son of Hullothur, and was even so styled by Hullothur himself in a written statement filed by him in an Act IV of the case before the Magistrate of Balasore." We have therefore the Judge of First Instance affirming, contrary to the general evidence on the part of the plaintiff, facts most material to the defendant's case, and the genuineness of the documentary evidence produced in support of it. His finding against the fact of adoption proceeds upon the improbability that in 1837 Hullothur, who might reasonably be expected to hope to beget, would adopt a son ; upon the discrepancy between certain of the defendant's witnesses as to the presence of Nath Das at the ceremony ; and upon the insufficiency of proof that all the requisite ceremonies were performed.

In this state of things their Lordships, at the close of the appellant's case, intimated that they could not see their way to a reversal of the very clear finding in favour of the fact of adoption to which the High Court upon a review of the whole evidence had come. Their Lordships conceive that the High Court was right in giving credit to the defendant's witnesses rather than to those of the plaintiff, who have deposed to a case which appears to be in many respects a false one. Their evidence is strongly corroborated, as the Subordinate Judge himself admits, by documents to which he has given credit ; and it seems to

Lordships to prove, as found by the High Court, the performance of the requisite ceremonies with as much certainty as can be expected some thirty years or more after the event. Against a case so proved, the *prima facie* improbability of the adoption, on which the Subordinate Judge so strongly relies, cannot, in their Lordships' opinion, weigh very heavily. It must be recollected that it is met not merely by the story of the inference drawn by Pundit from the horoscopes of the husband and wife (a circumstance which, if it really occurred, might have had considerable force upon superstitious minds), but also by the fact that Hullothhur and Jumona had lived together as man and wife for a good many years before the final adoption without having issue. Their Lordships must, therefore, deal with this case on the assumption that the fact of the defendant's adoption has been established.

The question whether such an adoption is valid in law is of greater difficulty, and, being one of general application, of far greater moment. It was in order to consider more fully the authorities cited upon this point that their Lordships reserved their judgment. The objection to the adoption is that it was of a very distant relation, not even within the class of Hullothhur's *sapindas*, made in violation of the preferential right of Dinobundhoo, the only son of Juggunnath; who was Hullothhur's son by the whole blood, to be adopted. The plaintiff relies only upon certain texts of the Dattaka Mimansa, and the Dattaka Chandrika, of which the former is considered by the Bengal School to be the more authoritative treatise on the subject of adoption. The texts chiefly insisted upon are the 28th, the 29th, the 30th, the 31st and the 67th slokas or paragraphs of the second section of the Dattaka Mimansa; and the 20th, the 21st, the 22d, the 27th, and the 28th paragraphs of the first section of the Dattaka Chandrika. It is unnecessary to set out these at length, since it may be conceded that they do in terms prescribe that a Hindu wishing to adopt a son shall adopt the son of his whole blood, if such a person be in existence and capable of adoption, in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father, by saying that, in the case of a brother's son, he should, nevertheless, be adopted in preference to any other person as a *Dvyámushyāna*,

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or son of two fathers. The grave question, however, that in this case is, whether the injunctions just referred to are binding upon the consciences of pious Hindoos as defining they ought to do, or so imperative as to have the force of the violation whereof should be held in a Court of Justice invalidate an adoption which has otherwise been regularly made.

Before considering this question, their Lordships think it to observe that the two propositions just stated, or at least two of them, may well be qualified by the incontestable fact that the lodhur was separate in estate from his brother Juggunnath. The whole of the law supposed to affirm the necessity of adoption of a brother's son seems to have been deduced by the ancient commentators, with what logical sequence it is unnecessary to come from a text of Menu, which says:—"If one among brothers whose whole blood be possessed of male issue, Menu pronounces that all are fathers of the same by means of that son." The direct sequence of this might well be that in an undivided family (in the normal state of a Hindoo family) the nephew, without any act of affiliation, would effectually perform the funeral obsequies of his uncle, whose share in the joint family property, in the absence of male issue, would pass to his co-parceners by survivorship. But in the case of a separated Hindoo, the right of performing his obsequies, with the consequent right of succession, in the absence of male issue, in his widow, or, failing her, in his daughter and daughter's issue. Again, to constitute a *Dvyamukha* adoption there must be a special agreement between the two fathers to that effect; or the relation must result from some of the other circumstances indicated by Sir William Macnaghten at p. 17 of his "Principles and Precedents." And he there states that the consequences to be different from those of an ordinary adoption, inasmuch as the children of the adopted sons would revert to their natural family. Hence the adoptive father fails by such an adoption to perpetuate his own line of male succession. A circumstance which renders the consent of divided brothers to such an adoption the more improbable. In the present case there is nothing to show, and it is unreasonable to presume that the lodhur would have been content to receive, or Juggunnath would have been willing to give, the only son of the latter in

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The general question seems to have been considered Thomas Strange, Mr. Colebrooke, and other text writers of eminence. Sir Thomas Strange, after recapitulating the authorities which ought to guide the discretion of the adopter, includes among them the authorities on which the plaintiff relies, says : " But the result of all the authorities upon this point is, that the selection is finally a matter of conscience and discretion with the adopter, and not of absolute prescription rendering invalid an adoption of a person being precisely him who upon spiritual considerations or other grounds have been preferred." And by his references to the cases cited in the second volume he shows that Mr. Colebrooke, and strongly, Mr. Ellis, were of this opinion. Again, Sir V. Macnaghten, just after referring to the case of *Ooma*, deals with the question thus : " It would appear, however, according to the law of Bengal and elsewhere where the doctrine of the Dattaka Chandrika is chiefly followed, and where the doctrine of '*factum valet*' exists, a brother's son may be selected in favour of a stranger ; and even in Benares, and in places where the Mimamsa principally obtains, and where a statutory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion. It may be held, then, that the injunction to adopt one's own *sapinda* (a brother's son is the first failing them to adopt out of one's own *Gotra*, is not so as to invalidate the adoption in the event of a departure from the rule." (Prin. and Prec. of Hindu Law, p. 10) It may be further observed that even Mr. Sutherland, in his " Synopsis" (see Stokes' Codes, p. 656), says : " But Nandita Pandita extends this principle (i.e., that proximity of kindred ought to determine the choice of an adopted son). In the elaborate minuteness, it cannot be regarded as a rigid rule of law, vitiating the adoption of a remote when a near relative or of a stranger, when a relative may exist. The right of a whole brother's son to be adopted in preference to any other person, where no legal impediment may obtain, seems to be a matter of discretion."

generally admitted, and may be regarded as a received rule of law. It is not easy to see upon what grounds the distinction is taken rests. If what the Dattaka Mimansa enjoins is to be taken as imperative and having the force of law, the language of the 74th article of the second section, which deals with the mode of selection where there is no brother's son, seems to be equally less imperative than that of the articles which affirm the preferential right of the brother's son.

It was urged at the Bar that the maxim "*Quod fieri non debuit fieri valet*," though adopted by the Bengal School, is not recognized by other schools, and notably by that of Benares. That it is not recognized by those schools in the same degree as in Bengal is undoubtedly true. But that it receives no application except in Lower Bengal is a proposition which is contradicted not only by the passage already cited from Sir William Macnaghten's work, but by decided cases. The High Court of Madras, in *Anna Gaundan vs. Kumara Gaundan*, 1 Madras, 54, and the High Court of Bombay, in a case reported in 4 Bombay, A. C., 191 (*Ráya Anandráv Anandráv Nimrákár vs. Javavántráv bin Matháráv Ádive*), acted upon it; and that upon the question of the adoption of an only son of his natural father, on which the High Court of Calcutta (*Raja Opindur Lall Roy vs. Raneé Bromemoyee*, 10 B. R., 347; 1 B. L. R., 221) has refused to give effect to it, considering that particular prohibition to be imperative. Their Lordships feel that it would be highly objectionable on any but the strongest grounds to subject the natives of India in this matter to a rule more stringent than that enunciated by such writers as Sir William Macnaghten and Sir Thomas Strange. Their Lordships' treatises have long been treated as of high authority by the Courts of India, and to overrule the propositions in question would disturb many titles.

Upon a careful review of the authorities, their Lordships cannot find any which would constrain them to invalidate the adoption of the defendant, even if it were more clearly proved than it is that Hulloohur Das could have adopted Dinobundhoo, the son of his brother. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal with costs.

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## [CRIMINAL REVISIONAL JURISDICTION.]

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March 27.

RAJCOOMAR SINGH AND ANOTHER . . . PETITIONERS

*Section 530, Code of Criminal Procedure—Order of Civil Court—Section 141, Indian Penal Code—Illegal Assembly—Refusal of Magistrate to summon witnesses for the defence—Section 359, Code of Criminal Procedure*

When the contending parties are admittedly in joint possession of premises, a Magistrate, under section 530 of the Code of Criminal Procedure, cannot determine whether one of them is at liberty to make use of the land in such a manner as to cause annoyance to another against his will. Such a matter is beyond his jurisdiction.

Any order passed under section 530 ceases to have effect when a party aggrieved by it obtains an order from the Civil Court deciding his rights as against such order.

It is not intended by section 359 of the Code of Criminal Procedure that a Magistrate should enquire generally into the nature of the offence, and then to consider whether he should absolutely abstain from summoning the whole of the witnesses cited by the accused; but that when the Magistrate considers that any particular witness is included for the purpose of vexation or delay, he should exercise his judgment and enquire whether such witness is material.

The nature of the offences defined in sections 141 and 425, Indian Penal Code, discussed.

**A**PPPLICATION to the High Court, as a Court of Revision, set aside as contrary to law the order of the Court of Session at Hooghly on appeal, enhancing the sentences passed by the Magistrate of the division of Serampore on conviction of the petitioners of causing mischief under section 427 of the Indian Penal Code.

The petitioners were convicted by the Magistrate of Serampore of rioting (section 147, Indian Penal Code), and were sentenced each to three months' rigorous imprisonment, being also required each to furnish recognizances on Rs. 100, to keep the peace for one year.

They obtained from the High Court (WHITE and McDONNELL, J.J.) a rule to show cause why these sentences should not be set aside as contrary to law; but this rule was cancelled by ANTHONY and McDONNELL, J.J. (see 1 C. L. R., 352) and the petitioners

to the usual remedy by appeal. They accordingly to the Sessions Judge of Hooghly, who, in dismissing appeals, enhanced the sentences to six months' rigorous imprisonment. They now again moved the High Court as a Court of Revision to set aside the conviction and sentences.

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son and Jackson, for Petitioners.

Bell, for Opposite Party.

Following judgments were delivered by the High Court (1):—

J. :—

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Conviction which led to the granting of this rule was first before a Division Bench of this Court on the 26th of last, on which occasion the learned Judges who heard the case directed that the complainant Dino Nath Ghuttuck be called upon to show cause why the sentence passed against the petitioners should not be set aside, and that in the meantime the petitioners be released on bail. The rule, which issued on the 6th of October, for some cause or other did not come on for argument before the 18th of January. It was then observed that the petitioners had a right of appeal, and the Court, considering the right which they had under the law should be first satisfied, discharged the rule, and observed that the Sessions Judge should exercise a wise discretion if, under the circumstances, he granted the appeal, although the regular time had elapsed. An appeal was made to the Sessions Judge, and that officer, without affording any relief to the petitioners, dismissed their appeal and doubled the punishment inflicted upon them by the Sessions Judge, and also directed that further proceedings be taken against the employers of the petitioners. On that a further appeal has been made to this Court, and we have now to consider the propriety of the original conviction, and also of the order passed by the Court of Session. I think it necessary, in going with this case, to go a little further back, to show what history of this matter has been ; because it seems to me of importance that the previous transactions and orders should be considered as enabling us to judge of the course taken by the Court and by the Magistrate.

(1) JACKSON and CUNNINGHAM, J.J.

1878 The subject of dispute is the mode of enjoyment of a piece of land which, as I learn from a small sketch which has just been handed to me, and of which the general correctness, I understand, is admitted by both parties, is situated to the south of the house of Shama Churn Lahory and close to but separated from the house by the Government road. A piece of land is situated at a distance of about two minutes' walk from the house of Gopee Kristo Gossain, and this Gopee Kristo is a joint owner to the extent of eight annas in the piece, Shama Churn being co-owner to the extent of four annas, and there is also a third owner who is not before us. It appears that at the time before the Doorgah Poojah, in 1876, Shama Churn desired to use this joint piece of land for the purpose of erecting upon it a platform supported by bamboos, which is called by the high-sounding name of *nobutkhana*: it was intended for musicians to sit upon, and the music to be performed there was probably connected with the approaching poojah. Some dispute having arisen in consequence of Gopee Kristo Gossain being unwilling that the land should be so occupied, the Magistrate of the sub-division made an inquiry and made an order under section 530 of the Civil Procedure Code, adjudging exclusive possession of that piece of land on which this *nobutkhana* stood to Shama Churn Lahory. In consequence of that, Gopee Kristo Gossain brought a suit in the Court of the Subordinate Judge, a suit of which the nature and result are not stated with sufficient accuracy by the Court. The object of it was to have it declared that Gopee Kristo Gossain was entitled to joint possession over the whole of this piece of land, and that Shama Churn Lahory was not entitled to erect a *khana* thereon, and it was specially prayed that this declaration should be granted, and that the *nobutkhana* should be broken down. The Subordinate Judge made a decree in all respects according to the prayer of the plaintiff, that is to say, his decree was that the plaintiff's suit be decreed. This decree, of course, ought to have been more carefully expressed, and the plaintiff's pleader ought to have taken care that effectual relief was secured under it. All that was done for that purpose was that a decree having been made on the 19th of May 1877, the plaintiff proceeded to the spot, and by planting a bamboo gave

symbolical possession. The *nobutkhana*, it appears, was not pulled down, but remained where it was. The very natural consequence was that, on the approach of the Dooorga Poojah of 1877, a dispute was renewed, and several servants of Gopee Kristo Gossain, acting doubtless under their master's instructions, went to the place and pulled down this erection. On that Shama Churn Lahory complained, the servants were brought before the Magistrate, and convicted of the offence of mischief and fined. That occurred on the 28th of September. On the morning of the 8th of October, the servants of Gopee Kristo Gossain, getting up early in the morning, found certain "ghuramies" in the employ of Shama Churn Lahory engaged in setting up this *nobutkhana* again. The men who made this discovery summoned others of their fellow servants, and they not only protested against the action but pulled down the bamboos, took them out of the ground, thrusting aside the servants of Shama Churn Lahory, and throwing to the ground another servant who had climbed up one of the bamboos, and who had clung to it. Upon this a further complaint was made to the Joint-Magistrate of Serampore the afternoon of the 9th of October. He immediately issued a summons and had the accused brought before him. We gather from the affidavit before us that the Magistrate in the first instance intended to deal with the matter summarily, but that on application of the pleader for the accused he agreed to take time and deal with it in the usual form. At the same time he altered the charge against the accused to one of rioting, which, of course, not being one of the offences specified in section 222 of the Code of Criminal Procedure, could not be dealt with in a summary form. One of the witnesses was examined before the charge was framed, and another afterwards. The defendants were called upon for their defence, and they named several witnesses. Now it is stated, but the Magistrate denies the statement, and I very willingly accept his denial, that, in the first place, he made a verbal refusal to summon these witnesses. However, summonses did issue on the following morning, but the witnesses were not to be found. On that, the accused applied to the Magistrate to grant further time for the appearance of the witnesses, representing that the time was a time of pooja

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when people were disinclined to attend the Court, and that they had not had a fair opportunity of procuring the attendance of their witnesses. The Magistrate, for reasons which he stated, declined to allow further time, and on the 12th of October proceeded to convict the prisoners of the offence of rioting under section 147 of the Indian Penal Code, and sentenced each to imprisonment for three months. The result of the appeal to the Court of Session, as I have already said, was that the Sessions Judge considered the sentence too lenient, and directed that the prisoners should each undergo rigorous imprisonment for six months.

It appears to me, in the first instance, that the Joint-Magistrate was in error in making any order in this matter under section 530 of the Criminal Procedure Code. It seems to me that the subject-matter was one to which that section could have no application. There was really no question of possession. The land was in the joint possession of the disputants, and the only question was whether one of them, being a joint owner, was at liberty to make use of the land in such a manner as to cause what the other joint owner chooses to consider an annoyance, and against the will of that joint owner. In fact the Magistrate himself, in a passage of his judgment, seems to furnish an excellent reason why he should not have exercised jurisdiction under that section. Adverting to an argument of the pleader for the accused as to the right of Gopee Kristo Gossain to forbid the mode of enjoyment, he says: "I am unable to accede to the application of this doctrine. The vakeel says that the doctrine would be monstrous, that a co-sharer might build a house upon land held in joint partnership for his sole use," and so on. Then he goes on to say: "The objection does not apply here, for *nobutkhana* is not a house; it is the flimsiest and most unsubstantial of structures. It occupies the air rather than the earth; it is an elevated platform on which musicians may sit. The grass grows under it, and goats and cattle graze there." The Magistrate's own argument therefore was that Shama Churn Lahory in erecting this *nobutkhana* chooses to occupy the air; and, although section 530 applies to land and water, it certainly does not comprehend the air. I have no doubt that the order under section 530 was beyond the power of the Magistrate, and ought not to have been made.

The Magistrate, however, not only made that order, but has relied on it in the proceedings now before us, because he has ordered a copy of it to be filed on the record, although it is manifest, from what afterwards took place, that the order had ceased to have any effect whatever, because the result of the order was that Gopee Kristo Gossain, being affected by it, immediately brought a suit in the Civil Court, and that Court declared that the defendant had no right to erect a *nobutkhana* in that situation, and the Court decreed that it should be removed. But as an order under section 530 is only valid until the persons to whom possession is given is ousted by due course of law, and as the effect of that judgment of the Civil Court certainly was to oust Shama Churn Labory, the order of the Magistrate ought not to have been referred to in any further proceedings. That order of the Civil Court, I understand, has not been set aside on appeal. It is not our business at present to consider the correctness of that decision. Undoubtedly, as far as the parties were concerned, it was a valid decision of a competent Court, and the Magistrate as well as the parties were bound to respect it.

In respect of what occurred in September 1877, it appears to me that the first conviction by the Deputy Magistrate was erroneous. The accused persons were convicted of mischief by the Magistrate. Now the definition of mischief is to be found in section 439 of the Indian Penal Code, which is this: "Whoever without lawful excuse, or knowing that he is likely to cause, wrongful loss or damage to the public, or to any person, causes the destruction of any property or any such change in any property, or in the position thereof as destroys or diminishes its value or utility, or subjects it injuriously, commits mischief." Now, as far as I can see, the only act done by the accused persons in that case was to cut down the situation of the bamboos (because they were not otherwise destroyed or injured) in so far as to put an end to their continuance in the form of a structure. Then looking to the word "wrongful loss" as defined in section 23 of the Indian Penal Code, I have, "Wrongful loss is the loss by unlawful means of property in which the person losing is legally entitled." Now, it is clear from the decision of the Civil Court which was then in force that Shama Churn Labory was not at that time legally entitled to have

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those bamboos put together in that place in the form of a *nobutkhana*, and consequently there was no causing of wrongful loss by the act done by the accused persons. It seems to me, therefore, that if that conviction had been brought before this Court, the exercise of its powers of revision, the conviction would have been set aside, but the employer of the accused appears through these proceedings to have been singularly ill advised. He obtained an illegal order made against him under section 530 untouched, which was allowed to remain untouched. He brings a suit in the Civil Court, of which he fails to obtain the full effect. His servants illegally suffer conviction for the offence of mischief, and that conviction is also allowed to pass unquestioned. He appears to have been then advised to cover this piece of ground with a wall of wood and bricks and other materials, which was undoubtedly an unjustifiable act. His servants being then charged with trespassing, it appears that their Counsel, instead of simply relying on the decision of the Civil Court, thought fit to argue before the Magistrate at length as to the question of right. Finally, when the conviction taking place, instead of going at once to the appellate Court the accused were advised to come before this Court, a procedure which undoubtedly prejudiced them in the mind of the Sessions Judge, and which has added very much to the expense and anxieties of these proceedings.

I am now coming to the particular proceedings which are before us. These petitioners were charged with the offence of rioting. Now first as to the procedure. It appears to me that the accused were undoubtedly prejudiced by the haste with which the prosecution was pushed on. I am unable to see for what public object this was done, or what was the particular importance of the case which the Magistrate refers. It seems to have been in the eyes of the Magistrate of particular importance that the employer of the accused persons should not gain his object; and from that it appears to result that he thought it was of great importance that the complainant should gain his object, that is to say whatever result of this prosecution might be, Shama Churn Lahory, the virtual complainant in the case, should be enabled to erect and keep erected this *nobutkhana* for such purposes as he thought desirable, and the Magistrate, in a passage of his explanation

It was submitted to this Court some time ago, says that, on going back to the proceedings, he is unable to see what other he could have taken. I confess it does seem to me strange, considering that this question had been already submitted to a Court which was competent to entertain it, and that that Court, whether rightly or wrongly, had determined that Shama Churn Lahory was not entitled to that particular form of enjoyment,—it does seem to me strange that it should not have occurred to the Magistrate that the right solution of his difficulty would be to restrain Shama Churn Lahory from doing that which the Court had decided he was not entitled to do until, at any rate, a further decision on the matter should have been pronounced.

I have next to observe the refusal of the Magistrate to allow to the accused for the appearance of their witnesses. The Magistrate (and I observe also the Sessions Judge) relies upon the alleged discretionary power of the Magistrate in this matter. Now, this being what is termed “a warrant case” the duty of the Magistrate in this particular is stated in section 219 of the Code. That section says: “The Magistrate shall, subject to the provisions of section 362, summon any witness and examine any evidence that may be offered on behalf of the accused person, to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time as may be necessary.” Section 362 says: “In warrant cases, the Magistrate shall ascertain the names of the complainant, or otherwise, the names of any persons who are likely to be acquainted with the facts and circumstances of the case, and are likely to give evidence for the prosecution, and shall summon them to give evidence before him as he thinks necessary. The Magistrate shall also, subject to the provisions of section 363, summon any witness and examine any evidence that may be offered on behalf of the accused person to answer or disprove the evidence against him, and may, for that purpose, at his discretion, adjourn the trial from time to time.”

Section 359, to which reference is there made, says: “If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, he may require the accused person to satisfy him that there are

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reasonable grounds for believing that such witness is material. Now I understand this section 359 to mean that if, among persons named by the accused as witnesses to a defence, the Magistrate considers any particular witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material. I have never heard that it was intended by that provision to enable the Magistrate to inquire generally into what the defence of the accused person is to be, and to consider whether, on hearing the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused. I am aware of no warrant for the exercise of any such sweeping authority. Setting that aside, can it be shown here there was any purpose of vexation or delay for which the witnesses were summoned? The trial was proceeding with great rapidity. The offence of which these prisoners were charged was very serious. The law enabled them to call witnesses in order to disprove or answer the case made against them, and considering what the time of the year was at which the first attempt to secure the attendance of these witnesses had been made, it does not seem to me that it would have been reasonable to allow a further time for that purpose, and I moreover think it probable that the reason of such time not having been allowed, the prisoners were prejudiced in their defence, because this was not a simple question. It was one which depended somewhat on minute considerations. The conduct of the parties, the mode in which one side or the other had acted, was of the greatest importance in determining, firstly, whether the accused had committed any offence or not; secondly, what was the nature and extent of that offence. The Magistrate indeed says, in order to justify his refusal, that the accused had confessed that with which they were charged. The accused confessed no such thing. They were charged with rioting. That which they had admitted was that they had pulled down these bamboos and displaced the erection. That is a long way from confessing the offence of rioting.

Another point upon which I think we are bound to remark is that the Magistrate, having at his command the means of obtaining evidence which was presumably impartial, that is to say, evidence of his own police officers, did not either call or examine

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the purpose of enforcing a right which he perfectly knew the Court had adjudged him not to possess, these persons, representing their master, went there for the purpose of committing that infraction of their master's right. It is admitted that particular force or violence was used, and that this was the only way in which it might be further inferred from the fact that the police officer who was on the spot saw no occasion to interfere. It appears, therefore, that there was no cause for convicting these persons for the offence of rioting, inasmuch as they were not there as members of an unlawful assembly, nor for any unlawful purpose. I think, therefore, that the conviction, as well as the procedure which the conviction was had, was illegal, and ought to be set aside.

I have only now to make one or two observations upon the errors which have occurred in the Court of Session. The errors into which the Magistrate has fallen are easily explained by the circumstances. He felt himself, whether rightly or wrongly, impressed with a duty of maintaining not only the peace of the district, but the authority of his own Court, and also by the fact that he had taken a large part in previous transactions, which led up to the conviction; and therefore that which he did, although it was, I think, erroneous, was far from unnatural. But these considerations do not apply to the Court of Session. The Sessions Judge is an officer of infinitely more experience; he was not affected by the necessity of maintaining the authority of the Magistrate's Court, or by any participation in the previous proceedings; yet he not only fails to point out the mistakes which the Magistrate had committed, but he actually goes beyond him in the course which the Magistrate adopted. The Joint-Magistrate has shown that he was not slow to vindicate the respect due to the Court, and he passed what he avowedly considers a severe punishment when he punished the petitioners with rigorous imprisonment for three months. I am quite unable to see upon what grounds the Sessions Judge, not merely affirmed, but actually confirmed that punishment. I think, therefore, that this rule should be made absolute, and the conviction and the proceedings of the Magistrate. The proceedings taken by the Joint-Magistrate against Kristo Gossain and Nundo Lal Gossain must accordingly be stopped.

CUNNINGHAM, J. :—

concur in setting aside this conviction. The facts in the case establish that certain co-owners were doing that, in the enjoyment of the common property, which, as between the parties, had been decided by a competent Court to be, and therefore must be regarded by us as being, illegal, viz., erecting a structure the erecting of which the Court had forbidden. Thereafter the other co-owners came in, and without violence or unnecessary force, and with no breach of the peace, abate the nuisance by pulling up certain bamboos of which the structure, so far as the building had gone, consisted. For this, they have been convicted of being members of an unlawful assembly, and sentenced to three months' imprisonment. This sentence was, on appeal, enhanced to six months.

It appears to me that the accused were merely exercising the very familiar to English Law of abating a private nuisance. The right is thus described in Stephen's Commentaries, 5th edition, Vol. III, page 354 :—"Whatsoever unlawfully annoys or does damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed by the party aggrieved thereby, so as he commits no riot in the doing of it, nor occasion in case of a private nuisance—any damage beyond what removal of the inconvenience necessarily requires." The rule laid down by Lord Denman in *Perry vs. Fitzhous*, 8 Q. B., 775. In that case a commoner, whose right of common was interfered with by a building erected upon the common, came and pulled it down "about the plaintiff's ears," while he and his family were sitting in it, and it was held that the serious risk of human life involved and the consequent imminent danger to the peace had, according to the analogy of the law of distress, the effect of rendering the plaintiff's act unlawful.

In the present case there appears practically to have been no violence and no real danger of any breach of the peace—indeed, the police were standing by and looking on while the abatement took place, and the act of abatement was, therefore, in my opinion legal.

The same view of the law appears to be reproduced in the Indian Penal Code. "Mischief" is defined in section 425, Indian

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Penal Code, as the causing of any change in property or in situation thereof as destroys or diminishes its value or utility affects it injuriously with an intent to cause wrongful loss to person, and explanation (ii) shews that mischief may be committed by an act affecting property of which the person committing is joint owner with others. Under this definition the act of the complainants in erecting the structure was, as I regard it, mischief.

Then, by section 99, Indian Penal Code, there is a right of defence of property, moveable or immoveable, against an act which falls under the definition of "mischief." I do not think that the third exception in section 99 applies, as the accused had the means to prevent the structure being made, which they could not have done if they had waited to go to the Court for an injunction.

The observations of Chief Justice COUCH, in a similar case, 19 W. R., Cr., 66—*Birjoo Singh vs. Khub Lall*, seem applicable to the accused in this case.

Under this view, I think, the accused were exercising a right of self-defence, consequently that there was no criminal force, no unlawful assembly, and no riot, and that the complaint must be quashed.

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## [CIVIL APPELLATE JURISDICTION.]

TI KOOR . . . . . DECREE-HOLDER ;

AND

HODRA KOOR . . . . . JUDGMENT-DEBTOR.

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February 14.*Execution of a decree which is afterwards set aside—Means Profits—Restitution.*

A sued B for possession. The suit was dismissed in the Court of First Instance, but, on appeal, the lower Appellate Court gave A a decree, in execution of which A was put in possession. B appealed specially to the High Court, who remanded the case to the Court below for a re-trial, the result of which was that the original decree dismissing the suit was affirmed. In execution of this decree, B applied for compensation in respect of the time during which A was in possession: *Held*, that he was entitled thereto; for where property has passed in execution of a decree which is afterwards set aside, the Court which gave possession is bound to make complete restitution.

*Nursing Chunder Sein vs. Bidyadhar Das*, 2 W. R., 275; *Harro Chunder Roy Chowdhry vs. Shoorodhane Deb*, 9 W. R., 407; *Chowdhry Shib Narain vs. Chowdhry Kishore Narain*, 10 W. R., 131; *Syud Abdool Jaleel vs. Kallee Koomar Dutt*, 6 W. R., 3 Misc.; *Bibee Hamida vs. Bibee Bhudhun*, 20 W. R., 239; *Bamu Soondaree Dabee vs. Tarinee Kant Lahooree*, 20 W. R., 415; *Gooroo Doss Roy vs. Stephens*, 21 W. R., 195; *Duljeet Gorain vs. Rewal Gorain*, 22 W. R., 435; and *Ununt Ram Haerah vs. Kuralee Pershad Mitter*, 23 W. R., 441; cited and followed.

*Sudasee Pillai vs. Ramalinga Pillai*, 24 W. R., 193; *Digamburee Dabee vs. Nundgopal Banerjee*, 1 W. R., 1 Misc.; *Huro Mohinee Chowdhraie vs. Dhun Mohinee Chowdhraie*, 10 W. R., 62; *Janokee Nath Mookerjee vs. Raj Kristo Singh*, 15 W. R., 292; *Syud Shah Ameer Ahmed vs. Syud Shah Zameer Ahmed*, 18 W. R., 192; *Bhoobunessuree Chowdhraie vs. Manson*, 22 W. R., 160; *Kalce Nath Doss vs. Rajah Meah*, 22 W. R., 406; and *Forester vs. Secretary of State*, L. R., 4 Ind. App., 137; cited and distinguished.

**SPECIAL APPEAL** from an order passed by the Judge of Bahad, affirming that of the Moonsiff of Buxar.

**Saboo Pran Nath Pandit**, for Appellant.

**Saboo Tarack Nath Pandit**, for Respondent.

1878 The facts of the case are sufficiently set forth in the judgment of the High Court (1), which was delivered by

LATI KOOR v. SAHODRA KOOR. AINSLIE, J. :—

Judgment.

AINSILIE, J.

Mussamut Sahodra Koor, the respondent in the present case, brought a suit against the appellant for possession of certain property. In the first Court her suit was dismissed, but on appeal she obtained an order in her favour, and having put the decree into execution, she obtained possession of the subject property. The defendants in that suit appealed to the High Court, and, the High Court having remanded the case to the Court below, the result was that the Court below affirmed the judgment of the first Court dismissing the suit. On this the defendant in the original suit, who is now the appellant before us, applied to the High Court to be restored to possession of the property of which possession had been taken by the other side in execution of the decree, and asked to have mesne profits given in respect of the property during which she was out of possession, and that such mesne profits should be calculated and awarded to her in execution of the decree of this Court by which the order for possession was set aside.

The Moonsiff was of opinion that, as the petitioner could not show any distinct decree by which mesne profits were awarded, he was not open to him to make any inquiry, excepting in the event of a regular suit for mesne profits. The District Judge affirmed that decision relying on a case reported in 20 W. R. 193—*Sadasiva Pillai vs. Ramalinga Pillai*, decided by the Council.

It appears to us that the view taken by the Subordinate Judge is not correct. A number of decisions of this Court have been cited, which lay down that, where property has passed in execution of a decree, and that decree has been set aside, the person who gave possession of the property is bound to make restitution to the person injured by its cancelled decree. The first of these decisions is to be found in 2 W. R. 275—*Chunder Sein vs. Bidyadharee Dossee*. That, no doubt, is the case exactly in point; the question there was with refer-

(1) AINSILIE and McDONNELL, J.J.

specific sum of money taken out from the Collectorate treasury in execution of a decree, but we think that the principle on which the Court then based its judgment is the same as that on which judgments in cases to be quoted further on are based. There is a case in 10 W. R., 131—*Chowdhry Shib Narain vs. Chowdhry Shere Narain*, which is distinctly in point; and in that case Mr. Justice BAYLEY, in delivering judgment, cited the opinion of the late learned Chief Justice, Sir BARNES PEACOCK, in the case of 2 W. R., 402—*Hurro Chunder Roy Chowdhry vs. Shoorodhonee Roy*. Sir BARNES PEACOCK said that “the decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree in the same manner as an ordinary decree carries with it a right to have it executed; and we should have considered that a decree of reversal necessarily authorized the lower Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced has been deprived by reason of its having been enforced. Further on he says: “In England, if a judgment is reversed for error, the person against whom the judgment was given is entitled to a writ of restitution. It is not a mere matter of discretion for the Court which reverses a decree whether the party against whom it was given is or is not to be restored to what he has been deprived of under it. There can be no doubt that in point of law the plaintiff was entitled to have the rents which the defendant had collected from her land whilst he was in possession refunded under the erroneous decree refunded. This case is not like the case No. 249 of 1865, reported in 6 Weekly Reporter, Full Bench cases, in which it was held that it was discretionary with the Court which passed the decree to award interest or not.” The learned Chief Justice goes on then to cite another case from 6 W. R., 3 Misc.—*Syud Abdool Jaleel vs. Kallee Koomar Dutt*. There are two cases—*Bibee Hamida vs. Bibee Bhudhun*, 20 W. R., 239, and *Bama Soonduree Dabee vs. Tarinee Kant Lahoo*—20 W. R., 415, in which the same view is adopted; and in 21 W. R., 195, there is a case—*Gooroo Dass Roy Stephens*—which came before Mr. Justice L. S. JACKSON and myself, in which we held that with reference to the judgment of the Privy Council in 14 W. R., 23 P. C.—*Rajah Leelanund Singh*

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**LALI KOONR** vs. *Maharajah Lakhmessar Singh*, the Court was bound to  
 out the order for the reversal of a previous order to the  
 extent, so as to relieve the person injured by the first order  
 all its consequences. The same view was followed in the  
 in 22 W. R., 435—*Duljeet Gorain vs. Rewal Gorain*, and :  
 R., 441—*Ununt Ram Hazrah vs. Kuralee Pershad Mitter*.

The cases cited on the other side do not appear to us directly in point. They are *Deegamburee Dabee vs. Num Banerjee*, 1 W. R., 1 Misc. ; *Huro Mohines Chowdrain vs. Mohinee Chowdrain*, 10 W. R., 62 ; *Janokee Nath Mookerj Raj Kristo Singh*, 15 W. R., 292 ; *Syud Shah Ameer Ahm Syud Shah Zameer Ahmud*, 18 W. R., 122 ; *Bhoobund Chowdhrair vs. Manton*, 22 W. R., 160 ; and *Kalee Nath De Rajah Meah*, 22 W. R., 406. On reference to these cases, it is seen that the whole of them refer to the extension of the order of decree, and not to the effect of an order for the reversal of a decree.

The case cited by the Judge, and a later case in L. R., App., 137—*Forester vs. Secretary of State*, only go so far as to establish what had been the practice of all the Courts in England, namely, that nothing can be added to a decree in execution ; but in this case it is not a question of adding to the decree at all. What the Court is asked to do is simply to set aside that which has resulted from its own action taken under an erroneous decree.

With reference to the case in 9 W. R., 402—*Huro Chunder Chowdhry vs. Shoorodhonee Debia*, it ought to be mentioned that Mr. Justice LOCH apparently does not altogether assent to the views expressed by the Chief Justice. An examination of the case, however, will show that in fact it belongs to the same class of cases as the other cases cited by the respondent, namely, that it may be treated as a case in which there was an attempt to extend a definite order. This will be seen by referring to page 405 of the same volume. It is there said that the Sudder Court on the 13th of May 1858, affirmed the decision so far as it related to the deed, and reversed it as to the award of possession to the plaintiff, and directed that the property should remain in the hands of the present plaintiff who, as widow in the absence of an heir, was entitled to the estate during her life as heir of her deceased husband.



aband. So that there was a definite declaration by the Court ; and it might be argued that it made that declaration advisedly, and that it was its intention not to go further than that. In the present case from the form of the proceedings stated above, it is evident that there could have been no such express or implied intention of the Court which set aside the decree under which possession had been taken. It was, therefore, open to the Moonsiff in the present application to do all that was necessary to make a restitution complete.

The Judge has said in his judgment : " I note further that the *de facto* possession of Mussamut Sahodra, between Falgoon and Bhadro 1871, is not established." If this were a finding of fact come to on the evidence, no doubt, sitting here in special appeal, we would be unable to deal with it ; but it appears to us that it cannot be treated as such ; for, although there is evidence on one side which has been uncontradicted by evidence on the other, it does not appear that any particular time was fixed for the parties to appear before the Court with all the evidence that they might have to give on questions of fact. The only order which has been brought to our notice is one by which the 23rd of January 1877 was fixed for hearing. That order is to the effect that it is fixed for the hearing of the argument, and for making such order as may then be necessary ; and it is evident that this was the course adopted by the Moonsiff. He dealt with the case as one which could probably be disposed of simply on a question of law ; and he in fact did dispose of it on a question of law without going into the facts at all. Had his opinion been the other way, we think it would follow from the order by which the 23rd of January was fixed for hearing, that he would then have made some order for proceeding upon evidence on the merits of the case. In the absence of such order the appellant cannot be concluded by the evidence produced by the other side and the absence of evidence on her part.

The case must, therefore, go back to the Court below to ascertain whether, as a matter of fact, Mussamut Sahodra ever was in possession of the property as the result of the execution of her decree ; and, if so, how much the appellant is entitled to receive from her as mesne profits in respect of the time during which she was in possession. Costs will follow the result.

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AINSLIE, J.

## [CRIMINAL REVISIONAL JURISDICTION.]

1877 IN THE MATTER OF BHOOBUNESHWAR DUTT . PETITIONER  
 December 14. *Indian Penal Code, section 173—Refusal to give receipt for summons.*

The refusal to give a receipt to a summons is not an offence under section 173, Indian Penal Code.

*Queen vs. Kolya bin Fakir, 5 Bom., 34, Crown cases followed.*

THIS was an application to the High Court, as a Court of Revision, to set aside the order of the Assistant Magistrate, Sewan, convicting the petitioner under section 173 of the Indian Penal Code, and sentencing him to a fine of Rs. 30, or, in default of payment, to twenty-two days' simple imprisonment.

Baboo Amarendra Nath Chatterjee, for Petitioner.

The judgment of the Court (1) was delivered by

MARKBY, J.:—

It appears to us that this conviction must be set aside. The charge against the petitioner was that he had refused to give a receipt for a summons. This has been held by the High Court of Bombay (5 Bombay High Court Reports, page 34, Crown cases) not to be an offence under section 173 of the Indian Penal Code, which is the section under which this conviction has been made. We concur in that decision.

This conviction will, therefore, be set aside, and the fine, if any, will be refunded. If the petitioner is in jail he will be released.

(1) MARKBY and MITTER, J.J.

## [PRIVY COUNCIL.]

PERIASAMI *alias* KOTTAI TEVAR . . . DEFENDANT;1878  
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AND

SALUGAI TEVAR . . . . . PLAINTIFF.

*Ejectment—Jus tertii—Objection first raised in grounds of Appeal—Duty of Appellate Court—Joint Hindu Family—Construction of Contract—Reversion—Mitakshara Law.*

Plaintiff in ejectment must recover by the force of his own title; and a defendant may defend his possession by setting up a *jus tertii*. It would be in the highest degree unjust to allow a defendant, who has been for nearly the whole time of prescription in possession of property of which he claims to be a purchaser for value, to be turned out of possession by any person other than one who had established a clear title to present possession.

Plaintiff brought a suit for ejectment and obtained a decree. The defendant appealed, and in the grounds of appeal raised, for the first time, an objection that the plaintiff had no *locus standi*. This objection was based on facts which came out in the course of the plaintiff's cross-examination. The High Court refused to consider the objection, on the ground that it should have been taken in the Court below. *Held*, that if there were not sufficient materials before the Court to enable the learned Judges to decide the question thus raised, they ought to have directed an issue, in order that the facts essential to such determination should be ascertained.

A and B, members of the same joint Mitakshara family, being under an erroneous impression that the legal effect of the happening of a certain event would be to vest in A the zemindary of Shivagunga, entered into an arrangement whereby A agreed that, on the happening of the event he and his offspring should have no interest in the zemindary of Padamattar; that B alone should be the zemindar and rule and enjoy the same. The event referred to did happen, but the zemindary of Shivagunga did not vest in A, whose son brought a suit for ejectment against the assignees of the son of B. *Held*, that the true construction of the agreement cannot be affected by what happened subsequently, and that it must be considered by the light of the circumstances as they existed at the time of its execution; that the effect of the arrangement was the same as if there had been a partition between A and B in which the property had fallen to the lot of B.

**A**PPPEAL from a decree passed by the High Court of Judicature at Madras. The case will be found reported in 8 Mad., 157.

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 ———
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 ———

The facts are sufficiently set forth in the judgment of Lordships of the Privy Council (1) which is as follows :—

The question common to the three suits which have been solidated in the appeal before their Lordships is whether the plain one Salugai Tevar, was entitled to recover from the defend in possession, all of whom claimed to be purchasers for value of the late proprietor Dhorai Pandian, under different titles, of villages, being in fact all that remained of the ancient Palai of Padamattur, which seems to have consisted originally of villages.

The various questions which were raised and determined in three causes, in all of which there was judgment for the plaintiffs, were substantially the same. Of these some are no longer contested, and of those that are contested the only one that has been argued before their Lordships is whether Salugai Tevar had established a sufficient title to maintain the suits. It is upon this question alone that their Lordships have now to express their opinion.

Before doing so, however, they wish to make some observations upon the manner in which the Courts in India dealt with the question, as appears from the following passage in the judgment of the High Court. The learned Judges say: "The defendant not only denied the legitimacy of the plaintiff, but also maintained that Dhorai Pandian, the last proprietor, having left a son, Vellai Nachiar, who is still alive, the right of suit is vested in him and not with the plaintiff. The Subordinate Judge, regarding the suit not as raising any question between contending heirs, but as a suit brought to recover from strangers family property fully alienated by a member, held that the plaintiff might be subject to any question between himself and others concerning his right to the inheritance. It appears to us that the right of Dhorai Pandian's widow, which was the only right urged before the Court below as prior to the plaintiff's cannot be maintained. The estate of Dhorai Pandian's was not a separate acquisition by him, following the course of succession prescribed for a separate estate, but an ancestral estate of the character already mentioned, the right to which would vest on his death without issue."

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTEAGUE SMITH and Sir ROBERT P. COLLIER.

lateral male heir of the undivided family in preference
 low. In this Court the defendants have urged a new
 of objection to the plaintiff's competency to sue, which
 arise on the plaintiff's deposition given in the suit. It
 here that 'there are preferential heirs to the estate,
 descendants of an elder branch of the family.' We
 the plaintiff, in his cross-examination, after mention of
 Ramalinga Shervai, the son of the Istimirar Zemindar,
 intimacy was questioned in the suit of 1823, says that
 respondent's, elder brother had two sons (by a kept mistress),
 there are three grandsons of his still living. The enquiry
 so far as is shown, fully pursued, nor was the Court asked
 upon the matter, and the issue already noticed respecting
 title of Dhorai Pandian's widow was alone tried and dis-
 A decision unfavourable to the defendants having been
 they now seek in appeal to bring forward, for the first time,
 as to the plaintiff's right to sue, which they declined to
 the Court below. We think they cannot fairly be permit-
 stage of the case to defeat the suit by such an objection.
 re other and nearer heirs, their rights will remain un-
 and any decree to be now given may make reservation of
 The plaintiff, for the purposes of the present suit,
 is regarded as entitled to the succession, and it is unneces-
 consider the arguments which were addressed to us on
 of the course of descent of this property on the
 that there were in existence descendants of his elder

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ships are of opinion that there is nothing to take
 out of the general rule relating to actions in the nature
 of ejectment, namely, the well-known rule that the
 must recover by force of his own title. They think that
 in the highest degree unjust to allow the defendants,
 kept for nearly the whole time of prescription in posses-
 sions of which they claimed to be purchasers for value,
 and out of possession by any person other than one who
 held a clear title to present possession. To allow this
 and that, if there should turn out to be other persons
 with title than the plaintiff, those persons might recover

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over against him, is obviously to deprive the defendants of their undoubted right to defend their possession by setting up a *tertii*, and it is further to be remarked that those persons possibly have been unable themselves to recover from the defendants by reason of having, by lapse of time or acts of conflict or acquiescence, lost the right to question their title.

With these observations their Lordships will pass to the consideration of the question before them, with reference to which will be sufficient to confine their observations to the proceedings in the first and principal suit.

The particulars of the claim, as stated in the plaint, are that the Palayapat of Padamattur was an impartible and ancient zemindari descendible by inheritance, according to the custom governing similar zemindaries and to the Hindu law; that it was held by a person with many *aliases*, being the Dhorai Pandian named in the pedigree; and that he held the right of ruling it till 7th November 1861, when he died at Padamattur without issue. The title of the plaintiff to succeed to him is thus stated: "The plaintiff being the son of the deceased Muttu Vaduganadha who was the undivided brother of the said Gouri Vallabha *alias* Muttu Sami, and of the deceased Bodhaguru Tevar, is the son's son now surviving of Oiya Tevar," who was the common ancestor. The plaint therefore asserts a title in the plaintiff to succeed to the Palayapat on the death of Dhorai Pandian, and consequently the right to impeach the alienation of the village by him. The nature and impartibility of the estate have been found by the High Court confirming the decision of the Court in these words: "We conclude that Padamattur is to be (apparently like other similar groups of villages in the Pongunda zemindari) a Palayapat impartible, and therefore held by a member of the 'family' and descending on a single heir. The question remains whether, on the death of Dhorai Pandian, the plaintiff of right became the Polygar. The facts stated in the plaint relating to his descent from the common ancestor are consistent with the pedigree set out in the appellant's case, and are taken as proved. And it may be true that upon those facts he has been, according to the ordinary course of Hindu law of inheritance, the next heir to Dhorai Pandian in the collateral line."

tion if that person had left no widow, or if the widow were from the nature of her husband's estate incapable of inheriting it. It may, however, be a question whether, putting the widow's possible claim out of question, he would be entitled to succeed to the Palayam. Nothing has been found by either Court in India as to the rule which governed the abnormal descent of Padamattur to a single heir. There is some evidence that up to the date of the transactions to be next considered it was governed in the course of direct descent from father to son, by the rule of primogeniture; but as to the rule in the case of collateral succession there is no evidence.

It may be desirable, before their Lordships approach the direct question to be decided, briefly to recapitulate some of the facts relating to this estate. Oiya Tavar, the then zemindar of Padamattur, died in 1815. He was succeeded by his eldest son, Muttu Vaduga. That person had two brothers, and therefore, whether Oiya Tavar were previously joint with his brother Gouri Vallabha, the Istimirar Zemindar of Shivagunga, in respect of Padamattur or not, the latter estate must be taken to have descended to Muttu Vaduga, as ancestral estate. He would, therefore, necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindoo family in the case of a raj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate, though impartible, was, up to the year 1829, in a sense the joint property of the joint family of the three brothers. In 1829, however, the uncle of the three brothers, who was zemindar of the great impartible zemindary of Shivagunga died. Padamattur appears to have been a sub-tenure of that estate, paying rent to the zemindar, and it was supposed that if Gouri Vallabha, the deceased zemindar, left no male issue, that large estate would go, according to the Mitakshara law of succession in the case of joint family property, to his eldest nephew, Muttu Vaduga, the then Polygar of Padamattur. In consequence of this the family arrangement embodied in the document No. 77, set out at page 133 of the Record, took place. The true construction and effect of that document will be afterwards considered. At present it is

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sufficient to say that the effect of it was to transfer the Pal of Padamattur to the next brother, Muttu Sami, on whose it descended to his only son Dhorai Pandian, who enjoyed his death in 1861. In the meantime the great estate of gunga was enjoyed, first by Muttu Vaduga, next by his son and second son in succession, and lastly, by his eldest gra by that second son. During all that time, however, the liti concerning the title to Shivagunga, of which the history w found in the 9th volume of Moore's Indian Appeals, at pag was going on. That was finally determined in 1863, b judgment of this Committee, which ruled that, thoug zemindar of Shivagunga, who died in 1829, had continued generally undivided in estate with the family of his brother Tevar, the former Polygar of Padamattur, the zeminda Shivagunga was his self-acquired property, and, therefore, dible to his widows, and failing his widows, his daughter i ference to his nephew. The result of that decision w Shivagunga passed from the line of Muttu Vaduga, who had transferred the Polygarship of Padamattur to his next brother Muttu Sami.

In the present case the defendants, relying in some deg the final decision in the Shivagunga case, by their writte ment insisted that the title of the widow of Dhorai Pa succeed to Padamattur on the death of her husband was p to that of the plaintiff. They founded this contention transaction of 1829, whereby, as they alleged, Muttu absolutely abandoned and renounced all his right to Pad in favour of Muttu Sami. They also alleged that for son prior to 1829 and since, the three brothers were divided and interest, and were living as divided members of a family. This part of the defence led to the settlement of 3rd, 8th, and 9th issues in the suit. The 2nd and "Whether Muttu Vaduga relinquished his interest in sued for; and if so, what is the effect of such relinquishm the plaintiff's title?"

The 8th issue is, If the plaintiff be found son of Muttu whether Muttu Vaduga and the last owner of Padamatt divided or undivided." The 9th issue is, "Whether t

was entitled to bring this suit during the lifetime of the last owner's widow." Those issues of course involved two distinct questions, namely, first, whether Muttu Vaduga was for all purposes severed from his brothers; and, secondly, whether he had not at the time parted with all interest in Padamattur as to make that particular property as between his descendants and Dhorai Pandian a separate estate of the latter, and so subject to the rule of succession affirmed by the decision of this Committee in the Shivaguanga case. In the course of the trial a further objection was raised to the plaintiff's case on facts which came out in the course of cross-examination. That objection was briefly to this effect, although he was the only surviving son of Muttu Sami, there were sons and grandsons of one of his elder brothers who, as the plaintiffs contended, would have a preferential title to Padamattur even on the assumption that Padamattur was to pass as separate property. That question, although no issue in the suit had been settled with respect to it, was distinctly raised by the grounds of appeal. The High Court nevertheless declined to adjudicate upon it, for the reasons stated in the passage of their judgment, which has been already read. Their Lordships think that, if there were not sufficient materials before the Court to enable the learned judges to decide the question thus raised, they ought to have framed an issue in order that the facts essential to such determination should be ascertained.

Their Lordships will consider in the first instance the first of the two objections which have been thus taken to the plaintiff's case, viz., the preferential title of the widow. In doing this they assume that the Indian Courts have correctly found that in 1829 the status of the family, consisting of Muttu Vaduga, his two brothers, and their children, continued to be joint and undivided; and, consequently, that the only question is, whether by the effect of the transaction in 1829 the particular property of Padamattur ceased to be the joint property of the three brothers, and so upon the death of Dhorai Pandian became subject to the rule of succession already referred to as affirmed by this Committee in the Shivaguanga case. That question, of course, depends on the construction to be put on the instrument at folio 138 of the Record.

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Now, various constructions have been put upon it. The first was that of the Subordinate Judge. He says, at page 296, "Although the relinquishment (taking it to be true) was thus rendered absolute,"—he is referring to the birth of the daughter of the deceased zemindar of Shivagunga,—“and kept Muttu Vaduganadha and his offspring out of the Padamattur estate for a time, yet, as they were judicially pronounced to come into the Shivagunga estate as usurpers, and were ousted from it, Muttu Vaduganadha's heirs or heirs are entitled to revert to the Padamattur estate.” This construction, their Lordships think, cannot be maintained. There are no words which import a right of reversion. The true construction of the document cannot be affected by what happened subsequently. The grant, whatever its effect, was not necessarily avoided, because subsequent events disappointed the expectation in which it was made, namely, that the estate of Shivagunga would remain in the line of Muttu Vaduga. One consequence of that construction and of the adoption of the doctrine of reverter might be to give force to the defendant's second objection, because it would assume—if indeed such an assumption could be made consistently with what was ruled here in the *Tagore case*—that a certain reversion remained in Muttu Vaduga, in which case it would be a grave question whether that reversion did not descend to his descendants in the direct line according to the law of primogeniture. Another construction was put upon the instrument by the High Court at page 329. Dealing with this part of the defence the learned Judges say: “The appellant's contention on this part of the case we understand to be that the instrument of relinquishment precludes all claim on the part of Muttu Vaduganadha's descendants that the family can no longer be regarded, as they admittedly were originally as a joint and undivided Hindu family, and that under the terms of the Limitation Act XIV. of 1859, the plaintiff's claim is barred, because Muttu Vaduganadha and his descendants are not shown to have participated in the income or profits of Padamattur since the year 1829. Although the fact of the division of the family in or before the year 1829 was alleged by the defendants in their written statement, no evidence of this was adduced, and it is only from the mode of enjoyment of the property

and from the effect attributed to the instrument of renunciation that this is inferred. We think it clear that the family must still be regarded as a joint Hindu family, and that a Vaduganadha's renunciation of his right in 1829, what-
 operation on himself and his descendants in possession of
 zamindari of Shivagunga, cannot operate further, and that,
 the death of Dhorai Pandian without issue, the right of
 succession, which then opened to the members of this joint
 family, was not affected by such renunciation. The words "We
 and our offspring shall have no interest in the said Palayapat,
 and we alone shall be the zemindar, and rule and enjoy the
 estate must be construed with due regard to the person using
 the words and the occasion when they were used. They refer to
 the estate and rights of the new so-called zemindar of Pada-
 mattur and amount to a declaration that the Palayapat shall be
 held by him exclusively, the Shivagunga zemindar disclaim-
 ing any joint interest. They are not a release by the latter for
 himself and his heirs of all future rights of succession, which
 may accrue to them as members of an undivided family." The
 sentences do not appear to their Lordships to be quite
 consistent. If the Shivagunga zemindar had disclaimed any joint
 interest, his words of renunciation taken alone would seem to
 imply that he had given up whatever interest he had, as a
 member of the joint family, in that estate. Their Lordships
 think that such a renunciation would not deprive the descendants
 of Vaduga of such future rights of succession as they
 afterwards have to that property, treating it as separate
 property *quoad* them,—such a right of succession, for instance,
 as may accrue to them in the present case upon the death of
 the father. But it does seem to be inconsistent with the retention
 of them, "of all future rights of succession which might
 accrue to them as members of an undivided family." The con-
 struction of the instrument for which Mr. Cowie argued at the
 trial does not substantially differ from that of the High Court.
 It is understood, as their Lordships understood, that the only
 object of the transaction was to transfer the ostensible headship
 of the family, as regarded Padamattur, to the second brother and
 his descendants, and so virtually to reduce the position

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of Muttu Vaduga and his heirs to that of a junior line. however, is not the construction which, after some doubt Lordships think must be put upon the document. The effect of it is in these words: "Agreement passed on" such a day me Oiya Tevar's son Muttu Vaduganadha Tevar of Padamattur in favour of my brother Gouri Vallabha Tevar." It is thus: "My junior paternal uncle Muttu Vijaya Ragh Gouri Vallabha Peria Udaya Tevar, zemindar of Shivanur having departed this life, leaving no male issue, I have been entitled to the said zemindary, and you, as my next brother, are appointed zemindar of the Palayapat of the Padamattur." It then refers to the pregnancy of one of the uncle's wives, and says, "I shall act as usual in the event of her giving birth to a son." Those words show where the grantor meant to make a gift on a condition. It is very well how to express what the condition was to be; it affords an additional argument against the construction of the document by the Subordinate Judge. Then follows a clause:—"But should she be delivered of a daughter"—which happened—"I and my offspring shall have no interest in the said Palayapat, but you alone shall be the zemindar by rule and enjoy the same, allowing at the same time, as per agreement, to the younger brother, P. Bodhagarnsami Tevar who in the pedigree is called Chinna Sami,—"the village has been assigned to him before." Now the plain meaning of those words seems to their Lordships to be that Muttu renounces for himself and each of his descendants all interest in the Palayapat either as the head or as a junior member of the joint family, whilst at the same time he reserved express rights of the youngest brother, Chinna Sami. The effect of the transaction, in their Lordships' opinion, was to make the particular estate the property of the two instead of the three, with, of course, all its incidents of impartibility and peculiarity of descent, and to do so as effectually as if in the ordinary partition between the brother, on the one hand, and two younger brothers on the other, a particular property had fallen to the lot of the two.

This construction seems to their Lordships to be at

rather than weakened by the subsequent clause as to the debts. He says: "As regards any debt contracted by me during the time that I was remindar of the said Palayapat you shall have no concern at all therewith, but I shall myself be responsible for the same." That clause reads as if he wished to transmit the Palayapat, in which he had abandoned all interest, to his brothers, cleared of the debts incurred by himself as Polygar, whatever might have been their nature, and whether they were a charge upon the estate or not. Their Lordships see no great improbability in such a transaction. Muttu Vaduga believed himself to be, by a title not then disputed, the proprietor of the large and valuable estate of Shivagunga. He might, therefore, well be content to abandon in favour of his brothers all his interest in the comparatively inconsiderable sub-tenure of which, as remindar of Shivagunga, he had become the superior landlord. That he should have done so and have afterwards lost Shivagunga was, no doubt, a misfortune for his family, and would be no greater subject of regret if the Polygarship of Padamattur carried with it anything more than the right of disputing transactions which were very possibly entered into by the parties in the *bona fide* belief that Dhorai Pandian had become sole owner of the estate; as, if their Lordships' construction of the document is right, he would have become so on the death of Chinna Sami without issue. But this unfortunate consequence cannot, in their Lordships' view, affect the construction of the document which must be considered by the light of the circumstances as they existed at the time of its execution.

Again, their Lordships may observe, their construction of the instrument is somewhat corroborated by what seems to have been the understanding of the family. It appears at page 71 of the Record that in the suit in which Muttu Vaduga's eldest son, Muttu Sami, and Chinna Sami were sued together for debts alleged to be a charge upon the Palayapat, both the first and the second defendants invoked the transaction of 1829, the first attending that, as his father had transferred the estate to his brothers, the second and third defendants, he was no longer responsible for the debt; Muttu Sami, on the other hand, rely-

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ing on the clause in the deed of 1829 by which Muttu Vaduga had agreed to take such debts upon himself.

Then again, in the cases that are found at pages 195 and 197 of the Record, in which Chinna Sami first, and afterwards his widow, were so ill advised as to raise the question of the partitionability of Padamattur, the suits seem to have been brought against the representatives only of Muttu Sami, and the representative of Muttu Vaduga are treated as having no interest in the matter. And, lastly, their Lordships' construction is in some degree further confirmed by the acquiescence of the plaintiff himself for nearly twelve years in the conveyances and transactions which he now seeks to impeach.

Their Lordships then have come to the conclusion that, between the descendants of Muttu Vaduga and Dhorai Pandian the Palayapat was the separate property of the latter; that at the death of Dhorai Pandian, his right, if he had any left undivided in the property, passed to his widow, notwithstanding the undivided *status* of the family; and that therefore the case was one to which the rule of succession affirmed in the Shivgunga case applies.

It follows, therefore, that their Lordships dissent from the finding of the two Indian Courts on the 9th issue, and hold that the plaintiff had no title to sue in the life of the widow of Dhorai Pandian. This being so, it is unnecessary to consider the other objection taken to the plaintiff's title. That objection involves considerations of some difficulty which perhaps could hardly be satisfactorily determined without further evidence as to the customary rule of succession to Padamattur.

Their Lordships will humbly advise Her Majesty to reverse the decrees of both the High Court and the Subordinate Court and to dismiss the three suits, with costs in both Courts. The appellants must also have their costs of the appeals; but in taxing those costs the Registrar must set off against the amount of costs payable by the respondents the taxed costs of the application to bring in fresh evidence, which were in any case to be borne by the appellants.

[CIVIL APPELLATE JURISDICTION.]

BALLI AND ANOTHER DEFENDANTS;
 AND
 BERMING AND ANOTHER PLAINTIFFS.

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 March 12.

Trade mark—Misrepresentation—Injunction—Account—Rival importers.

Per GARTH, C. J.—If A, a trader, makes use of a mark which connotes a certain quality, either from its ordinary signification or from the fact that such mark is used by the trade to denote quality, then A cannot complain of the use of such mark by any other person in the same line of business. But if the mark used by A has, in its ordinary signification, nothing to do with quality, but is a symbol which has come to connote quality solely through being used by him in a certain connection, then A is entitled to the exclusive use of that mark in that connection, and an injunction will be granted to restrain a rival trader from so using it.

Where A, a trader, has been selling a certain kind of cloth marked with a distinctive symbol, and this cloth has obtained peculiar value and celebrity in the eyes of the public, who have learned to place faith in the cloth sold by A by reason of its being so marked, the use of this mark by B upon similar cloth would be calculated to deceive the public into the belief that, in buying the goods marked by B, they were buying the goods which they had bought for years before imported and sold by A, and B will, therefore, be restrained from using such mark.

The Court will not direct the keeping of an account of sales which may be made, but will—even on an interlocutory application—restrain the defendant from selling at all, where the mischief intended to be guarded against by the injunction would be effected by allowing any sale to be made.

Per MARKBY, J.—There is no reason why traders, who are importers only, should not have trade marks as well as manufacturers. If the law declares, as it clearly does, that no man has a right to put off his goods as the goods of a rival manufacturer, it seems to follow that no man has a right to put off his goods as the goods of a rival importer.

When a trader has expressly selected and appropriated a particular device for the purpose of distinguishing his goods, such device becomes his trade mark proper, and no one else may use it; and if, without any such express selection or appropriation, a particular device comes to be associated with the trader's name, so that all goods bearing that mark are supposed to come from him, then also the law will not allow any other

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person to use that mark. There is, however, this distinction between the two cases : in the former, the Court will grant an injunction to restrain the use of the device by a rival trader without any evidence that the public has been deceived, or that the use of the mark is calculated to deceive them ; but it will not do so in the latter case without clear evidence to that effect.

APPEAL from an order passed by Mr. Justice MACPHERSON in the Original Civil Jurisdiction of the High Court, making absolute a rule *nisi* for an interlocutory injunction.

In the year 1872, the plaintiffs, Nicol Fleming & Co., commenced to import a certain kind of cloth known as 7½ lb grey shirtings, and they adopted the following means of distinguishing this cloth : In the centre of each piece is a stamp in blue colour of a turtle in a star with the words trade mark ; immediately underneath is the name "Fleming, Galbraith & Co., Manchester" and under it the number 39 in a star ; at the bottom of each piece is the number 2008. The plaintiffs alleged that this cloth gained a great reputation in the Calcutta market amongst the native buyers, and was known and called for by the name "2008" or "*do hazar at.*" In July 1877, the plaintiffs learned for the first time that the defendants were importing and selling cloth of the same description as theirs, and distinguished in the following manner : Each piece was marked with a stamp in blue colour of a rose in a square ; immediately underneath the words "Ralli and Mavrojani, Manchester," the name being arranged in the same semi-circular form as the words "Fleming Galbraith & Co.," on the plaintiffs' cloth ; underneath is the number 39 in a star similar to that used by the plaintiffs ; and at the bottom is the number 2008, the figures in which are identical in shape and size with those on the plaintiffs' cloth.

In the tenth paragraph of an affidavit made by Mr. Alexander Westerhout, an assistant to the plaintiffs' firm, he states : "I am informed and verily believe that up to a very recent period the defendants have been selling similar cloth, but with a different number, namely, 177, instead of the number 2008 now adopted by them, the character of the figures being dissimilar, and the words "Ralli and Mavrojani" were then printed in a different style of lettering to what they have now adopted."

of cloth bearing the abovementioned number 177, and by the defendants before they imitated the plaintiffs' trade as hereinbefore mentioned, is hereunto annexed and marked

[The mark on the bottom of this exhibit was "No. 177" not "177." The defendants denied that the cloth sold under

number was of the same quality as that sold under the number

From the seventh paragraph of the same affidavit it appeared that one Bholanath Khettry was employed by the plaintiffs as a piece goods broker during the years 1875 and 1876, when he left the plaintiffs, and entered the defendants' service.

When made an affidavit on behalf of the defendants, the paragraph of which is as follows: "After I left the plaintiffs' firm, I was applied to by bazar dealers for grey shirt-cloth of the same manufacture as those sold by the plaintiffs under the chhua (turtle) mark and bearing the number 2008, and I directed the defendants' manager to order similar goods from the manufacturers, putting the defendants' own stamp and ticket on them, and this they did, and imported five bales in May, 1878, the last which were sold on arrival; and subsequently the plaintiffs got an order for fifty bales of the same cloth which they had ordered from Manchester, and which arrived during the month of August." It appeared that these fifty-five bales of cloth were all that the defendants imported bearing the number 2008.

In the 15th paragraph of their plaint, the plaintiffs charged that by the use of the aforesaid mark impressed on the goods sold by the defendants, the defendants are enabled to pass off their goods and to get the same into the hands of retail purchasers as goods imported by the plaintiffs, and that the use of the said mark is calculated to deceive (and the plaintiffs believe deceived) the purchasers of the goods imported by the plaintiffs, and the belief that such goods are in fact goods imported by the plaintiffs, and they prayed for an injunction, an account, and other relief.

The defendants alleged that 7½ lb grey shirtings are imported containing about fifty pieces, each piece being 39 yards length or thereabouts. That they merely followed what was a variable rule amongst houses importing piece goods, name-

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ly, to have the name of the firm, a number denoting the l of the piece in yards, and a number to distinguish each part kind, or variety, or quality of the goods, stamped on the ea the pieces which, from the way in which they are folded, an seen on opening the bales ; and that the principal firms, in ing the plaintiffs and themselves, in order to distinguish the imported by them, affix each a coloured ticket bearing its trade mark, and stamp that trade mark on the cloth itself. the numbers placed on the ends of the bales are quality nur merely, put on for the purpose of distinguishing goods of one q from those of another, and not as indicating in any way the p or firm importing the goods into the Calcutta market. That they had heard from Bholanath Khettry of the demand for shirtings of the kind sold by the plaintiffs, they purchased five bales of the same cloth from the Manchester manu who supplies the plaintiffs, and imported it into Calcutta fo in this market. That the cloth so imported is precisely th in quality and texture as that imported by the plaintiffs, in order to show this, and also to show that it was imported defendants and not by any other importer, they put the name and trade mark on the cloth as well as the number. That the cloth so marked and numbered was known in the ket as "Ralli and Mavrojani's 2008," while that of the was known as "Nicol Fleming's 2008" and not as "2008 ly. That it is impossible to deceive purchasers in the alleged by the plaintiffs, as they are invariably in the h looking at the tickets and stamps abovementioned, and of ing the quality and texture of the cloth offered to them fo and that, in fact, none were so deceived. They dem plaintiffs' right to the number 2008, and declined to give use of it.

On the 10th of September 1877, a rule nisi was calling on the defendants to show cause, on the 13th of Sep why an injunction should not issue against them as pray On the 14th of September this rule was made absolute was ordered by Mr. Justice MACPHERSON

"That a writ of injunction be awarded against the defendants restraining them, their servants and agents, until the furth

the Court, from importing and selling the description of cloth as seven and a half pounds grey shirtings or any other or goods impressed with stamp in blue colours of a rose square with the words—'Ralli and Mavrojani, Manchester,' each, arranged as the words 'Fleming, Galbraith and Co., Manchester,' are arranged in the plaintiffs' trade mark, having underneath these words the number '39 within a and at the bottom the number '2008;' and from importing such cloth impressed with any mark being an imitation or similar or only colourably differing from the plaintiffs' mark; and it is further ordered that the costs of this application be costs in the cause."

That this order the defendants appealed.

(Advocate-General,) *Bell*, and *Bonnerjee*, for Appel-

—We object to the decision of the Court below on three points:—(1) No injunction should have been granted; (2) the injunction granted is too wide; and (3) an account would have been amply sufficient. We contend that no injunction should have been granted, because the marks which we have put on our cloth do not deceive and are not likely to deceive any one into the belief that they buy from us the respondents' cloth. We are not using the plaintiffs' trade mark which is the turtle; they do not put the number 2008 as a part of their trade mark; and if they did, there can be no trade mark in numbers.

THE C.J.—The test is, have you put that number on your cloth for the purpose of deceiving the public?

—We are entitled to use any number we please. There is no special property in a number. We are perfectly entitled to use the same cloth as they. It is in fact the same cloth, made by the same manufacturer, and the number 2008 was put on by us so that the cloth we were selling came from the same manufacturer as that of the defendants; they say it is calculated to deceive but they give no instances. People who could read would not be deceived, and people who could not would rely on the mark and not on the number 2008.

THE C.J.—Is it explained whether 2008 was put on the

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cloth by the manufacturer of his own accord or by the merchant? Why did you put on 2008 ?]

Paul.—Because the natives thought that 2008 was the manufacturer's mark; and we put on the number to show the cloth was manufactured by the same man, as it was. The number is no part of their trade mark. *Woollam vs. Ratcliffe*, and *M.*, 259, shows that the essential part of a trade mark is the symbol, which, in this case, is the turtle.

[*MARKBY, J.*—Does not *Woollam vs. Ratcliffe* show that not so much a question of trade mark as a question of fraud?

GARTH, C.J.—The whole question is, does the putting of this number amount to a representation that the goods imported by the plaintiffs? The affidavit of your witness *Bholanath Khettry*, seems to me to amount to that.]

Counsel cited *Parina vs. Silverlock*, 6 De G., M. and G. Story's Eq. Juris., § 95 b; *Wheeler & Wilson Co. vs. Spear*, 39 Law Jour., Ch. 36; *Blackwell vs. Crabbe*, 39 Law Jour., Ch. 504; *Woollam vs. Ratcliffe*, 1 H. and M. Adams on trade marks, pp. 11, 17, *et seq.*; *Burges vs. B.* De G. M. and G., 896; *Ainsworth vs. Wamsley*, L. R. 518; In the matter of *Mitchell's Trade Mark*, 7 Ch. 46 Law Jour., Ch. 876.

Bonnerjee, on the same side, contended that the former order passed by the Lower Court was incorrect—*Perry vs. Beavan*, 66. He complained that no sufficient time—only a few days—had been allowed to the defendants to show cause against the rule, and contended that no injunction should have been granted, as the marks were very dissimilar and the evidence relied on by the plaintiffs insufficient.

Counsel cited *Raggett vs. Findlater*, L. R., 17, 1 H. Welsh vs. Knott, 4 K. and J., 751; *Batty vs. Hill*, 1 H. 264; *Cheavin vs. Walker*, 5 Ch. D., 850; *Singer Manufacturing Co. vs. Wilson*, 2 Ch. D., 434; *Blanchard vs. Hill*, 2 Atkin James vs. James, L. R., 13 Eq., 421; *Perry vs. Beavan*, 66.

Jackson, Evans and Phillips, for the Respondents.

Jackson.—I shall ask your Lordships to rule that these numbers are a part of our trade mark. We have used them on the same cloth upwards of five years; that cloth so stamped has obtained and obtains ready acceptance and reputation in the market; the number has in fact, through our exertions, become known as an indication of superior quality, and the cases show that under such circumstances we should not be deprived of the exclusive right to it.

MARBY, J.—I should have great difficulty in coming to the conclusion that 2008 is a portion of your trade mark, and my opinion is this:—You yourself call attention to what your trade mark is; you put the word "trade mark" in several places to distinguish, seemingly, what is and what is not a part of your trade mark. You do not put it in connection with the number 2008.]

Jackson.—The question of a trade mark is widely different from that of a patent, where the specification must state clearly everything which the patentee claims. It is conceded by the defendants that 2008 is not a manufacturer's mark, that there is a demand for cloth bearing the number 2008, and that they use the number 2008 for the purpose of satisfying that demand. It is unnecessary for me to contend that the plaintiffs had an intention to deceive—it is sufficient if their acts were calculated to deceive—the public. They say they were not, and that there is no resemblance in the two marks. Why, not only have they used our number, but they have formed the figures in the same peculiar way. No doubt, looking at the two pieces of cloth, there are a great many dissimilarities when you come to distinguish them. But your Lordships will remember that you see those pieces of cloth side by side, while the purchasers do not. The pieces are, however, in shape and size identical, and it is by the numbers that the natives, unable to read the names of the owners or of their places of business, would be guided.

The counsel read and commented on the unsatisfactory nature of the defendants' affidavits, and cited *McAndrew vs. Bassett*, 33 Law Jour., Ch. 561; *Seizo vs. Provezende*, L. R., 1 Ch., 192; *Therapoon vs. Currie*, L. R., 5 H. L., 514-15; *Hall vs. Bar-*

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Cloth Co., 11 H. L. C., 523, 558; *Ford vs. Foster*, L. R., 7 (611, 622; *Chappel vs. Davidson*, 2 K. and J., 128.

Phillips followed, on the same side.

Paul (Advocate-General) in reply :—*The Singer Manufacturing Co. vs. Wilson* shows that the defendants in this case claim 2008 as a part of their trade mark. The *Leather Cloth vs. American Cloth Co.* shows that it must be taken to represent only the quality of the goods. We are precisely in that position as the defendants in the latter case. Our intention was to show that we were rivals.

[GARTH, C.J.—Suppose Fleming for his own purposes, by this trade mark, had put on a dog to designate some quality; would you have a right to sell that cloth with the dog on; saying it not to be a part of the trade mark, but a thing the means of which they alone know and you do not know, and a mark which gives the cloth value in the eyes of native buyers?]

Paul.—If the dog at the bottom were the means of getting the cloth currency in the market, it would form part of the trade mark; but there cannot be a trade mark in numbers.

[GARTH, C.J.—Suppose *Anatolia* was on the cloth instead of 2008. I do not see any difference between the two cases.]

Paul.—At any rate, the question of an injunction properly comes on at the hearing. In a case of this kind no injunction should be granted on an interlocutory application, at least without giving an undertaking to indemnify us against damages.

Counsel cited *Ewing vs. Grant*, 2 Hyde., 185; *Lee vs. L. R.*, 5 Ch., 155; *Gory vs. Norwich Ry. Co.*, 3 Hare, 598; VIII of 1859, section 56.

The following judgments were delivered by the Court (1) :—

GARTH, C.J. GARTH, C.J. :—

I am of opinion that this injunction was properly granted. In order to make its meaning more clear, I think the form should be slightly modified. There is no doubt, I conceive, as to the law of the case; and there is but little difference between

(1) GARTH, C.J., and MARBURY, J.

the parties as to the actual facts. The difficulty, if there be any, is to ascertain the fair and reasonable inference which we ought to draw from those facts. I propose dealing with the matter at this stage as shortly as I can, in order to avoid prejudicing the defendants' case at the hearing of the cause, when the Court may probably be supplied with fuller materials than it has at present for ascertaining the truth.

For the present purpose it appears to me sufficiently established, that the plaintiffs, Messrs. Nicol Fleming & Co., have for several years past been selling a particular cloth in the market, which has obtained celebrity there, and become readily saleable; that this cloth is known to the public by certain marks, which are described conspicuously upon it, and especially by the number "2008," which is printed upon each piece in large figures, and in a particular position and combination; and that the defendants, Messrs. Galli and Mavrojani, having imported similar cloth obtained from the same manufactory, have had marks impressed upon their cloth in a combination generally resembling that used by the plaintiffs, and especially introducing, in a similar position, and in figures of the same size and character, the number "2008," knowingly for the purpose of giving their cloth a saleable quality in the market which it would not otherwise possess. Thus far, there is no difference between the parties as to the facts.

The defendants say that the plaintiffs are entitled to no monopoly of the sale of the cloth in question; that they are not manufacturers of it; and that they, the defendants, have as much right to obtain it from the manufacturers, and sell any quantity of it in the market, as the plaintiffs have. This is, of course, perfectly true; but the question is, whether, for the purpose of giving the cloth a saleable quality, the defendants have a right to use these marks, which undoubtedly are, in some essential particulars, an imitation of marks which have hitherto been used exclusively by the plaintiffs. The defendants say that they have adopted either the plaintiffs' name or their trade mark proper, which is a turtle; that they describe on the cloth their own name and trade mark, which is a rose. They admit that they use the number "39," in the same connection and for the same purpose as the plaintiffs use it, viz, to denote that each piece of cloth is

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39 yards in length, and they claim a right to use the number "2008," as merely conveying to the public, that the cloth they sell is of the same quality as the plaintiffs'. The plaintiffs, on the other hand, say that this combination of marks, although differing from theirs in some respects, is undoubtedly an imitation of it; and that by using their combination, and especially by the use of the number "2008," which is admitted to be the main descriptive feature which renders the cloth valuable, the defendants would lead the public to believe that the goods which they are selling are goods imported or sold by the plaintiffs' house. This is the real pith of the case; and it is that the Court is called upon to draw a fair and reasonable inference from the facts.

If the defendants' combination is so different from the plaintiffs' that the public could not reasonably be deceived by the use of it, or if the number "2008" was merely a manufacturer's mark, or was used generally by the trade to designate a particular quality of cloth, no doubt the defendants would have a right to use either the combination or the number as the plaintiffs'. But, on the other hand, if the object of the defendants in using this number and in imitating the plaintiffs' combination was to lead the public to believe that the goods which they sell were imported by or came from the plaintiffs' house, then I consider, in point of law, the defendants would not be justified in deceiving the public to the plaintiffs' prejudice.

Now, in determining this question, I think we ought to consider, in the first place, how it was that the defendants came to use these marks at all; and in the next place, who and what the buyers of these goods are, and how and by what considerations they may be influenced. First, then, the evidence in the case comes very clearly to my mind, how it was that the defendants came to use these marks. From the seventh paragraph of the affidavit of Mr. Westerhout, the plaintiffs' assistant, and the affidavit of Bholanath Khettry, the broker, which he made on behalf of the defendants, it appears that in the years 1875 and 1876 Bholanath was employed by the plaintiffs to sell this cloth for their house. He well knew the estimation in which it was held

ket; he knew that it was saleable only by marks used by plaintiffs; and when he left the plaintiffs' employ, and began to act as broker to the defendants, he was asked in the market for these same goods, which he had been selling previously for plaintiffs and as their goods; and he then advised the defendants to buy similar cloth from the manufacturers, and to have it marked in their own way. It is clear to me that it was through a man's advice, though he does not actually say so, that the defendants had the number "2008" printed on their goods, and that their combination of symbols was made in such a form as to imitate that of the plaintiffs'.

It must here be borne in mind, and it is in my opinion a most material feature in the case, that the number "2008" was a symbol used exclusively by the plaintiffs and impressed only on goods which came from their house. It was not a manufacturers' number; it was a symbol, the use and meaning of which was not known to the defendants, and is not now known to the court. It was known to the plaintiffs only. The defendants chose to say that they understood it to notify the quality of the cloth; and they say this, because other cloths of different qualities sold by the plaintiffs are marked 2006 and 2007; but this is a mere conjecture on their part, and they do not profess to understand, nor can they in fact know, the true origin or meaning of that symbol. If they had used the words "first quality" or "second quality," or such an expression as "superior," or "superfine" or "superdurable," they would have used terms which are intelligible to all the world, and the use of which could not be calculated to deceive. But the number "2008" is a peculiar symbol, which like a lion, or a tree, or a flower, would convey a particular meaning to the plaintiffs themselves, but to none else, and which could only have been used by the defendants, because it had been used by the plaintiffs in the sale of cloth.

Now then, let us see, secondly, who were the buyers of these cloths in the market, and what considerations influenced, or were likely to influence, them in making their purchases? The buyers and consumers of this class of goods would be for the most part the native public,—people, who, as a rule, cannot

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read or write English, who would scarcely distinguish the of "Nicol, Fleming & Co." from that of "Ralli and Mavr and who certainly could not understand, even if they could the words "Trade Mark." They might possibly, if they examined the print carefully, distinguish between a rose and a turtle what they would naturally most be guided by is the appearance of the combination described on the cloth; and admitted according to the evidence on both sides that the distinctive mark in that combination was the conspicuous "2008," by which name, "*do hazar at*," the cloth item known in the market.

From these considerations it appears to me that the almost necessary inference to be drawn is this: That plaintiffs for a period of five years had been the only selling this cloth in the market by these distinctive marks as during that time the cloth had obtained peculiar celebrity in the eyes of the public, who had learnt their faith in the goods so marked and sold by the use of these marks upon similar cloth by the defendants would be calculated to deceive the public into the belief that goods which they were buying were the goods which they bought for years before imported and sold by the plaintiffs. In other words, would naturally lead them to suppose that the buying goods which came from the plaintiffs' house. In reaching this conclusion I do not think it necessary, in this particular to go narrowly into the question whether the whole or, if any, what particular part of the plaintiffs' combination be considered as their trade mark proper? I think, considering who and what the buyers of these goods would understand very little of what was a trade mark. I only say that if the imitation of the plaintiffs' mark, or of the use of the number "2008" in particular, be calculated to deceive or mislead the public, the defendants ought to be restrained from such use or imitation.

It was urged upon us in argument by the defendant that by confirming the judgment of the Court below, we be imputing direct fraud to a firm of respectable merchants exposing them to obloquy and odium in the commercial

the cause itself had been finally determined ; and we were, re, much pressed to dissolve the injunction, and merely give the defendants to keep an account of their sales at the hearing. But I confess it seems to me that in this argument, the learned counsel have done their clients justice. I have no reason to suppose that in using these the defendants knew that they were committing a fraud, or the plaintiffs any actionable wrong. I dare say these men may have carefully considered, nay, I think it not probable that they may have taken advice as to how far they use these marks without infringing in any way upon the rights of other people. But they have done what many good men have, under similar circumstances, done before ; they have made a mistake. Without any evil intention, they have been guilty of what I consider a fraud in law, and this I am bound to prevent them, until the rights of the parties are finally ascertained at the hearing, from repeating it.

In this particular case I do not think that their keeping an account of sales would be a sufficient protection to the plaintiffs, if the defendants were allowed to use these marks in the market for several months in order to sell their cloth, they would become as well known in the market as importers and sellers of the cloth, as the plaintiffs, and so the very mischief, which the injunction is intended to guard against, would have been done. I think, therefore, that this appeal should be dismissed, with costs, but that the form of the injunction should be varied so that the defendants be restrained from selling any cloth with the combination of marks described in the exhibit to the affidavit of Alexander Westerhout, or any other mark resembling that used by the plaintiffs, and specially the number 2008 in any such combination."

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In this case I have had some doubt whether it is desirable to give my views at length, but, upon the whole, I have come to the opinion that I ought to do so. The plaintiffs and defendants are both merchants in Calcutta, and both are in the habit of selling largely goods known by the name of grey shirtings

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from Manchester, which they sell chiefly to native dealers' bazar. These grey shirtings are delivered by the manufacturer to the correspondents of the parties at Manchester unmarked. The outside fold of each piece is there marked by the correspondents of the firms here. There has been for some time a great similarity between the marks in use by the plaintiffs, and in use by the defendants. The general character of the mark in use by both the firms is as follows:—At the top is a paper ticket pasted on the cloth with a device thereon, as the name of the Manchester correspondents in English and the three native languages well-known in the bazar. Beneath the device similar to the device on the ticket impressed by a stamp on the cloth itself. Beneath this again the name of the Manchester correspondents in large English letters (which in the case of the defendants is the same as the name of their firm here); lower down the figures 39, being the number of yards in each piece; and at the bottom of all a number which generally signifies the quality of the cloth. About five years ago the plaintiffs began to sell grey shirting of which was marked at the bottom with the number 2008. Some time in the year 1876, the defendants commenced selling shirtings bearing the same number. The plaintiffs then complained that the defendants were infringing their trade mark and required them to desist. The defendants signified their willingness to make some alterations in the marking of the cloth but insisted on retaining the number 2008. The plaintiffs were not satisfied with this, and the present suit was accordingly brought. When the plaint was filed, the plaintiffs applied and obtained an interlocutory injunction, restraining the defendants from using their trade mark; and it is against the granting of this injunction that the present appeal is brought.

I am not aware of any previous case relating to trade marks as used by traders who are importers only, but I see no reason why there should not be such a trade mark. If the law is as it clearly does, that no man has a right to put off his goods as the goods of a rival manufacturer, it seems to me to follow that no man has a right to put off his goods as the goods of an importer. The confidence reposed in the skill, care and reputation of a particular firm may give a special value to goods

by them. The question is, did the defendants put off goods imported by themselves, as goods imported by the plaintiffs? There is no question here as to the quality of the goods sold by the defendants under this number being the same in quality as the goods sold by the plaintiffs under that number; nor is there any question of the right of the defendants to sell goods of this particular quality, which may be bought at Manchester by any one who chooses to pay for them.

The plaintiffs claim the whole of that which is impressed upon the outside of each piece of cloth as their trade mark. How far they can do this I shall have to consider in dealing with another part of the case. Conceding for a moment that it would be possible for the plaintiffs to make out this claim, it seems to me to be clear upon the evidence that the only infringement of which they can complain is the use of the number 2008. They have themselves produced a piece of cloth with respect to which one of their own witnesses makes the following statement. [His Lordship here read the tenth paragraph of Mr. Westerhout's affidavit, set out in the statement of the case, *ante*, and continued.] If the piece of cloth here referred to be looked at, and the mark on it compared with that now in use by plaintiffs, it will be seen that this statement really reduces this infringement to the substitution of "2008" for "177." The meaning which the plaintiffs attach to the figures "2008" has not been disclosed by them; but it is clear to me from these affidavits that, whatever meaning the plaintiffs may attach to these figures, they are treated by the public as a quality mark. Whether as a quality mark of importation or as a quality mark of manufacture only, I shall consider hereafter. It is also clear that considerable value is attached to this mark as a mark of quality by buyers of this description of cloth. It is, moreover, not shown that any other firm in Calcutta imports cloth bearing this number except the plaintiffs and (recently) the defendants; but the plaintiffs themselves import grey shirtings of a slightly different description bearing the numbers 2007 and 2009.

As I understand the law upon this subject, no trader can complain against a rival trader in regard to any announcement he makes concerning the goods which he sells, so long as no

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statement is made which is untrue or calculated to mislead. besides making use of ordinary language and their own name in order to announce to the public what they wish to sell known with respect to their goods, traders are in the habit resorting to a variety of devices in order to catch the eye of the public, and to represent to them in a striking manner what they wish to announce. Sometimes they wrap their goods in a fancy cover; sometimes they impress upon their goods a fancy name; at other times a fanciful plant or animal; and when a trader specially selects and appropriates to himself, for the purpose of distinguishing his goods, a device of this kind, the device becomes his trade mark proper, and no one else is allowed to use it. But if, without any such special selection and appropriation, the goods of a trader do in fact happen to bear some particular mark, and this mark has come to be associated by the public with this traders' name, so that all goods bearing that mark are supposed to come from him, then also the law will not allow any person to use a mark of this latter description more than it will allow him to use a rival traders' trade mark proper; and for this reason, because in either case there is or there is assumed to be made, a representation to the public which is false, namely, that the goods which are the goods of one trader are the goods of another. But this distinction has been drawn between these two cases. If it be shown that a trader has infringed a rival trader's trade mark proper, that is to say, the mark which another trader has specially selected and appropriated for the purpose of distinguishing his goods, the law will, without further evidence, at once interfere, taking it for granted that such a proceeding is calculated to deceive the public; whereas, if the mark be one which has not been specially selected and appropriated by the trader for the purpose, evidence must be given to show that the mark was so understood by the public, in order to make it clear that the proceeding had been intended to deceive, or was at least calculated to deceive the public. Both of both these kinds are usually called trade marks, and the distinction between the two cases is not one of principle; it is one which is convenient, when examining the evidence which it is sought, to prove the infringement.

; dealing with the question whether the figures "2008" are part of the plaintiffs' trade mark proper, I think upon this as it appears that they were not. The plaintiffs themselves, I consider, told the public with sufficient accuracy what the mark is, to enable us to say with certainty that these were no part of that device which they themselves had selected and appropriated for the purpose of distinguishing their own goods from those of other traders. It is, as is well known, a very common custom amongst traders when they adopt a particular device in order to distinguish their goods, to tell the world that they have done so by attaching to the device of this device upon their goods the words "trade mark." It is a notice to the public of what their trade mark proper is, and to other traders not to use it. Such a notice greatly benefits the trader who has adopted the device in the appropriation of his goods. But a trader who gives such a notice must, I think, be understood to confine his trade mark proper to what is actually covered by the words. Now it appears that the plaintiffs have, in conformity with this custom, made an announcement to the world of what their trade mark consists. Upon the cloth produced by them, and marked according to their fashion the word "trade mark," appears twice—once upon the green paper impressed upon the green paper pasted on to the cloth and once upon the stamp impressed upon the cloth itself. In both cases the words are attached to the figure of a turtle in the centre of a star. I think it is quite clear, therefore, that the plaintiffs have represented to the world as the device which they designate their goods is this turtle in a star. I think is the reasonable construction of the plaintiffs' announcement; at any rate I cannot, by any construction of the words, extend them so as to cover the figures "2008." The figures "2008," therefore, not being any part of plaintiffs' trade mark proper, we have then to consider whether these figures have been so associated with the plaintiffs' name as to lead to the understanding of the public, that goods of this kind and bearing this number come from their firm, and whether the use of these figures by the defendants is calculated to deceive the buyers of ordinary intelligence. This is the most

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favourable way of putting the question for the plaintiffs. I am sure that it is not a little too favourable, but let that pass. If I had to decide this case finally upon the evidence now before me, I feel bound to say that I can see no evidence that figures have been so associated with the plaintiffs' name. I perhaps be known in the bazar that the plaintiffs are in the habit of importing and selling this particular kind of grey shirting. There is also ample evidence that buyers have a preference for this particular kind of grey shirtings; but there is, as far as I see, no evidence that they like them any the better because the plaintiffs import them, or that the figures "2008" are understood by any one to signify that the plaintiffs had imported them. It seems to me that all the evidence in the case, particularly that of the plaintiffs' own native witnesses, goes to show that these figures are understood by buyers to indicate the date of the manufacture, and that only, and that they are not supposed to have anything whatever to do with the importation. Any deception of the public, of course no one acquainted with the goods is marked upon these goods by the defendants could ever have known that the cloth sold by the defendants was imported by the plaintiffs. The name of the defendants' firm is stamped upon the goods several times over in a variety of languages—English, French, and Oriental,—and all the native brokers who have given evidence in the case state themselves to be acquainted with the meaning of the marks. They could not, therefore, have been deceived as to who were the importers; and they do not pretend to say that they were so. But it is said that these goods are sold by the brokers to persons of less intelligence, who would not understand the whole of the marks, and who would be caught by the figures "2008" only. This is a reasonable and may be assumed; still what do the witnesses say? They say that native purchasers buy the cloth by the figures "2008" and not from any examination of the nature or quality of the cloth. That, however, as I understand the law, is not sufficient. The plaintiffs, I will assume, first adopted the combination of figures "2008," and attached to them some meaning which is a secret. The public have attached to them the same or another meaning, namely, that they indicate

cloth so marked is of a particular quality. Where is the representation, which is an essential element of the plaintiff's case in the defendants' use of these figures? If the coming to the public of these figures when expressed in full is more than this, "it is hereby represented to the public that a piece of cloth is of a certain quality," then every trader in Calcutta has a right to make this representation and make it by any words or symbols that he likes. There can be no exception to make such a representation, or to make it in any particular manner. If, indeed, the meaning of the figures, as understood by the public is this, "It is hereby represented that these goods were imported by Messrs. Nicol Fleming & Co.," that would be quite another matter. But that is what I do not see anywhere stated in the evidence.

If, therefore, this suit were now before me for final determination, I should feel compelled to say, that in my opinion the plaintiffs had not made out even a *prima facie* case. But it will be a manifest inconvenience if, upon this interlocutory application, there should be a difference of opinion giving the parties a right to a second appeal before the suit is heard. That is clearly not desirable. I think, therefore, that upon this interlocutory application, I am justified in yielding my opinion to that of the Chief Justice and Mr. Justice MACPHERSON, and not expressing any formal dissent from the judgment of the Chief Justice which substantially dismisses the appeal.

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[ORIGINAL CIVIL JURISDICTION.]

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AND

SREEMUTTY DOORGAMONY DOSSEE } DEFEND
AND OTHERS }*Limitation—Splitting claims—Void residuary bequest—Express trust
adverse possession—Act IX of 1871, section 10—Act IX of 1871,
arts. 145, 122.*

A Hindu testator devised certain property to the sons of his who might be born after his death, gave several legacies to his others, and appointed his mother executrix. The testator died, and in 1866 his wife sued for her legacies and got a decree; and more than twelve years from the date on which the executrix took possession of the testator's property, the widow brought a suit claiming the devise to the unborn son was void, and that she was entitled to the property as on intestacy: *Held*, that the suit was barred by the provisions of section 7, Act VIII of 1859.

Section 10 of Act IX of 1871 refers merely to suits by specific legatees against their express trustees. [See section 10 of Act IX of 1871.]

Where an executor takes possession of his testator's property under a will containing a void residuary devise and bequest, his possession from the very commencement, be adverse to the heir-at-law who takes the residue as on an intestacy, and a suit by the latter will be barred by Act IX of 1871, sch. II, arts 145, 122.

Adverse possession is a matter of fact.

Karnaghan vs. McMurray, 12 Ir. Ch. Rep. 89; *Lister vs. Lister*, 34 Law Jour Ch., 582; 34 Beavan, 576; *Sturgis vs. Morse*, 3 Beavan, 1; and Jones, 1; cited and distinguished.

THIS was a suit by the heir-at-law for the construction of the will; for a declaration that the testator died intestate; for certain property attempted to be disposed of by the will, and consequent relief; for a receiver; and for an account. The suit was brought by the widow of the testator against his son, Doorgamony, the sole executrix under the will, and two sons of a sister of the testator.

testator, Gopaul Lall Bysack, died on the 4th of February and on the 1st of March next ensuing Doorgamony, the ix, proved the will and took possession of the estate. The will contained bequests of money and ornaments to the testatrix, and a provision that she should have the right of living in the family dwelling-house, directed the payment of other debts, and gave the residue of the property "to the son born to my sister's husband, Srijoot Woodoy Mullick, and his son or sons that may hereafter be born to him," in default of issue; and the executrix was to divide the residue amongst the children when they should attain maturity. In the meantime the residue was to remain the *karta* of the family.

On the 18th of August 1865, Kherodemony brought a suit against the executrix Doorgamony, for the money and ornaments bequeathed to her, and for a declaration that she was entitled to live in the family dwelling-house. A decree was passed in her favour on the 8th of March 1866. She instituted the present suit on the 16th of July 1877, claiming that the bequest of the residue was void under the Hindn Law, and that she, being her sole heir, was entitled to succeed as upon an intestacy. The case came on for settlement of issues, a preliminary decree was taken that the suit was barred by limitation, and Act VIII of 1859.

and Phillips, for the Plaintiff.

The suit is not barred by limitation, as this claim is governed by section 10 of the Limitation Act, which is not confined to trusts, but includes trusts for a specific purpose. Doorgamony was a trustee of the testator's property for the purposes, namely, for the benefit of the legatees named in the will, and for the benefit of the person entitled to the residue, who is the plaintiff if the bequest be void. It is to be held that section 10 does not include this case, the suit is not barred, for no cause of action arises until the property is deliverable or the money payable; and this does not arise until the administration of the estate is completed, which has not taken place in the case. As regards the immoveable property, the suit is barred within time, being governed by clause 145 of the

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second schedule of the Limitation Act, which allows twelve years from the time when possession becomes adverse. Now Doorgamony alone has been in possession of the property, and if her possession is adverse now, it must have been adverse from the very commencement, as it is admitted that nothing has been done to change it; but at the commencement her possession could not possibly be adverse as she took the property for the purpose of administering it—took it as a mere trustee for those beneficially entitled to it, including the heir-at-law. As for the objection taken under Act VIII of 1859, section 7, the present suit is not brought against the same defendants; besides it was a claim which was made under the will, while here is a claim against the will.

Counsel cited Lewin on Trusts, p. 722; *Williams vs. Pratt*, L. R., 12 Eq., 149; the case of *Palmer's Estate*, Coryton, 68; *Lister vs. Pickford*, 34 Law Jour., Ch., 582; 34 Beav. 576; *Morice vs. Bishop of Durham*, 10 Vesey, 522; *Omnancy vs. Butcher*, 1 Tur. and Rus., 260.

Bonnerjee, and *Hill*, for the Defendants.

Section 10 of the Limitation Act of 1871 is confined to express trusts, and this suit is clearly out of time—*Treepoorasooder Dassee vs. Debendronath Tagore*, I. L. R., 2 Cal., 45; *Paine vs. Jones*, L. R., 18 Eq., 320. It is, besides, clearly barred under Act VIII of 1859, section 7—*Jumona Dossee vs. Bamasooder Dossee*, 2 W. R., 148; *Abhiram Das vs. Sriram Das*, 3 B. L. R. (A. C.) 421; *Ganes Chandra Chowdhry vs. Ram Kumar Chowdhry*, 3 B. L. R., (A. C.), 425; *Mackintosh vs. Gill*, 12 B. L. R., 37; *Moonshee Buzloor Ruhum vs. Shumsounissa Begum*, 11 Moore Ind. App., 582-3, 603.

The judgment of the Court (1) was delivered by

PONTIFEX, J. PONTIFEX, J. :—

In this suit, Sreemutty Kherodemony Dossee sues for her husband's estate as in a case of intestacy. The husband in fact leave a will, under which he gave Rs. 5,000 to his mother.

(1) PONTIFEX, J.

Company's paper for Rs. 5,000 to his wife, the plaintiff, for maintenance, and for the performance of *broto*s and other religious acts. He gave her power to draw interest upon that Company's paper, but the will directs that she shall not be able to expend the principal money or corpus. It further directs that the testator's wife shall live in "my room in my family dwelling-house, and whatever religious acts, &c., she shall perform, she will do the same with the consent of my mother, Thacooranee." The testator also gave Rs. 2,000 to his sister and Rs. 500 to his sister's daughter, and having given these legacies bequeathed: "Whatever ready money and Company's papers will remain in deduction of the abovementioned legacies, and the family dwelling-house, tenantable land, wearing apparel, &c., whatever there is of the same I give in equal shares to the son lately born to my late husband, Srijoot Woodoy Chunder Mullick, and to the son (or sons) that may hereafter be born (to him); when all of them shall attain maturity you will divide (the property) amongst them. In the present you remain (are) the *kurta* (sole manager); you will support the said son and others and my wife, (i.e.) all of them, in the amount of rent and interest on the Company's papers, and you will sell Company's paper, if required in giving those sons a marriage or performing *koolokurmo* (i.e., the customary ceremonies of the family). Should there be no agreement between my wife Sreemutty Kherode Dossee and my mother, and the former live separate, or should she live in her father's house, then she must maintain herself with the interest on the said Company's paper for five thousand rupees; she will have no concern with the property and share of my sister's sons and mother Thacooranee. You will pay my debts, and get in the dues (moneys receivable by me). For the management of the above business I, of my own accord, appoint my attorney and executor; you will manage the business after consulting (i.e., taking the opinion of) Srijoot Kallachund Bysack, elder brother (or cousin) Mohashoy, and Srijoot Woodoy Chunder Mullick, Baboos;" and, lastly, he says, "of the jewels, &c., which were given to my wife at the time of my marriage, some were pawned and given; these have not as yet been prepared and returned (her); I therefore give her Company's paper for Company's share one thousand, (representing) the adequate value there-

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of." The testator died on the 4th of February 1860, and 18th of August 1865, the present plaintiff, the testator's instituted a suit against his mother, Doorgamony Dossee to recover certain ornaments, &c., and for a declaration that she was "entitled, as widow of the deceased, to reside in the dwelling-house of the deceased in Calcutta, to have a maintenance allowed to her out of the estate of the deceased, and to have delivered to her by the defendant as executrix, and the terms of the testator's will, the sum of Rs. 1,000 Government promissory note endorsed to her, with interest, and to have Rs. 194-5 paid to her for expenses of the suit performed by her on account of her deceased husband. The decree in that suit, dated the 8th day of March 1866, it was declared that the plaintiff was entitled to reside in the family dwelling-house, and Rs. 1,000 was directed to be paid to her as executrix, and Rs. 5,000 was appropriated to her use. Subsequently to the decision in that suit, on the 16th day of March 1877, the plaintiff instituted the present suit, having been that the limitation in her husband's will to the sons of her husband was void for remoteness. She has brought the present suit against Sreemutty Doorgamony Dossee, executrix of the late Gopaul Lall Bysack, her deceased husband, and Jeetoo Lall Bysack, an infant son of the testator's sister, and Woodoy Chund Bysack representing another deceased son of the sister. The suit is defended by the defendants on two grounds: first, that under section 10 of Act VIII of 1859, the plaintiff is incompetent to sue for a portion of her claim relinquished or omitted in her former suit, and, secondly, on the ground of limitation. Taking the question of limitation first, it is insisted on behalf of the defendants that the limitation does not apply, because her case falls under section 10 of the late Limitation Act; or, in other words, that the defendant Sreemutty Doorgamony Dossee is an express trustee, and therefore no time can run against the plaintiff. The words of section 10 are: "No suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives, for the purpose of following in his or their possession such property, shall be barred by any length of time."

Disregarding the word "vested" as not applicable to the

can it be said that the defendant holds for a specific purpose and if so, for what specific purpose? It may be said that the defendant holds for the specific purpose of paying debts and legacies; but it is clear that that is not a specific purpose as intended by section 10; for, by other parts of the Act, creditors and legatees are barred by non-claim. It may also be said that an executor or administrator holds the residue for the specific purpose of paying the legatees or next-of-kin, but it is also clear that that is not a specific purpose within the meaning of section 10; and by clause 122 of the second schedule to Act IX of 1871, it is provided that an executor or administrator cannot be sued for a share or for a distributive share of the moveable property of a testator or intestate after twelve years, and it has been held that a "legacy" includes the residue; and when we look at the Limitation Act we find that the policy of the Legislature was to extend that provision, for clause 123 is not restricted to moveable property, but twelve years is the limitation for a share or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate. I think, therefore, that, so far as the plaintiff is concerned, this is not a specific purpose within section 10, and if we look to see what is the specific purpose for which the defendant holds, we should find by the will (after paying certain legacies) specifically for the sons of the testator's sister. Mr. Phillips called attention to the fact that the plaintiff is under the will entitled to certain specific rights, to the residence and the income of the Rs. 5,000 legacy; but that she does not claim those specific rights, but claims the residue, and by her decree in the former suit she has already waived the specific rights by a declaration that she is entitled to the family dwelling-house of her husband, and the defendant has been directed to pay her Rs. 1,000, and to bring her Rs. 5,000, the interest of which was to be paid

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section 10, therefore, does not in my opinion apply; and I would only operate where a specific *cestuique* trust was an express trustee. If that section, then, does not save the plaintiff's suit, does any other section affect her? It appears to me that she is barred by clause 122 of the second schedule

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of Act IX of 1871, so far as relates to the moveable property as this is a distributive share of the moveable property testator or intestate. Some stress of argument was indeed on the employment of the word "share" in showing the clause was not intended to apply to the whole residue, but seems to me that one must not weigh too nicely the language used in an Act like this. I can conceive no reason for any distinction. Why, when a residue is divisible between two persons should they be barred, if, when only one person is entitled the clause does not apply? Looking at the English Act of 1871 and 24 Vict., c. 38, s. 13, upon which this Indian Act probably founded, I find that no difference is made between a person entitled to a share and the person entitled to the whole residue. As to the immoveable portion of the testator's property, clause 145 of the schedule to the Act applies, and that clause provides for twelve years as the period of limitation. But it is said that the possession by the defendant, Doorgamony Dossee, ought to be considered adverse as she took as executrix, and that in such cases were relied on to show that a trustee being in possession such possession could not be adverse, and I was referred to the passage in the last edition of Lewin on Trusts, page 72, where it is said "the possession be held by the trustees of an express trust with respect to the legal estate, but who mistakes his *cestuique trust* as to the rents to wrong person, the possession of the trustee is not the possession of the rightful *cestuique trust*, and the wrong person in possession of the rents does not acquire a title by adverse possession under the Statute." In support of this *Karnaghan vs. Molloy*, 12 Ir. Ch. Rep., 89, is referred to. Unfortunately the Reports are not forthcoming, but *Lister vs. Pickford*, 31 L. J. Ch. 582, which has also been referred to, seems to be on exactly the same circumstances as the Irish case. To those cases I may also add *Sturgis vs. Morse*, 3 De Gex and J. In all those cases, however, the person who held possession was an express trustee; and both under section 10 of the Act and under the English Act, time never runs while the person is in possession of an express trustee. Both according to the plaintiff and to the defendants' written statement it seems that nothing can be more adverse than what has taken place.

in case. During the whole time since the death of the
the executrix has received the rents and applied them to
herent and adverse purpose. The plaintiff is, therefore, in
possession, barred under the Limitation Act.

On the application of section 7 of Act VIII of 1859, I should
be instant in the case of an express trustee to put a construction
on that section which would bar a specific *cestuique trust* from
this trustee; but this is not, in my opinion, the case of an
express trustee. In 1865 the plaintiff had all her present rights
in the parties were at arms length, but then she only claimed
restitution of her rights. She is, therefore, I think, barred
under section 7, Act VIII of 1859, and consequently no issues
arise in this case.

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PONTIFEX, J.

—Section 10, Act IX of 1871, has been replaced by section 10, Act XV
which is as follows:—

Notwithstanding anything hereinbefore contained no suit against a
person in whom property has become vested in trust for any specific purpose,
or his legal representatives or assigns (not being assigns for valuable
consideration), for the purpose of following in his or their hands such property,
shall be barred by any length of time."

In reference to the foregoing section, the Legal Member of Council, on the
passing of the Act, remarked: "We had altered section 10 and the second
clause in accordance with a suggestion of Mr. Justice GREEN, one of the
Justices of the Bombay High Court, so as to preclude the litigation likely to
arise from the use of the words 'good faith,' and to protect a purchaser for
valuable consideration from an express trustee, whether the purchaser had or
had not notice of the trust at the time of the purchase. In this respect
the Act would then agree with the present English Law of Limitation (3 and 4
Edw. VI. c. 27, sections 2, 24, 25), save that the lapse of time necessary to
bar an action would be twelve instead of twenty years; and this difference
will appear on the 1st of January 1879, when the Statute 37 and 38 Vict.,
c. 57, shall come into force." On and after the 1st of January 1879, the
Law of Limitation above referred to will be as follows:—

38 Vict., c. 57, s. 1.—"No person shall make an entry or distress,
or an action or suit to recover any land or rent, but within twelve years
from the time at which the right to make such entry or distress, or to
bring an action or suit, shall have first accrued to some person through

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whom he claims; or if such right shall not have accrued to any person to whom he claims, then within twelve years next after the time at which right to make such entry or distress, or to bring such action or suit, shall first accrued to the person making or bringing the same."

3 and 4 Wm. IV., c. 27, s. 25.—"Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, or any person claiming through him, shall recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

By the 36 and 37 Vict., c. 66, s. 25, sub-sec. 2 (Judicature Act, 1873), it is enacted that "no claim of a *cestuique trust* against his trustee for a property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." There is no corresponding provision in the Indian Limitation Act.

It has been held that section 25, 3 and 4 Wm. IV., c. 27, is confined to express trusts; that is, trusts expressly declared by a deed or by some other written instrument; it does not mean a trust that is implied out by circumstances; the trustee must be expressly appointed by a written instrument. "If a person has been in possession, not being a trustee, under some instrument, but still being in under such circumstances that, on the principles of equity, would hold him a trustee, then the Statute does not apply; and if the possession of such a constructive trust is continued for more than [twelve] years, he may set up the Statute against the party who, but for the lapse of time, would be the right owner." The section is confined to the case of a bill being filed by the *cestuique* against express trustees, or those claiming under them; that is, in which the contest is between those two parties; and it has no application where the contest is as to a right between the *cestuique trust*, and persons not being express trustees"—*Petre vs. Petre*, 1 Drewry, 371.

The seventh and eighth sections of the Statute of Frauds are applicable in India, and, therefore, all declarations or creations of trusts of land in the Presidency towns, be in writing signed—*Stoke's Acts in force*, p. 49. Trusts of personalty may be by parol, as may trusts of land of Hindus in the mofussil, as there is no transaction of Hindu law which absolutely requires a writing—*Crinisasammi vs. Vijayammal*, 2 M.

[CIVIL APPELLATE JURISDICTION.]

PUNCH COWRIE MULL AND OTHERS . . . PLAINTIFFS;
AND
GUNNOO LALL AND OTHERS . . . DEFENDANTS.

1878

April 1.

Religious Trusts—Right to sue—Corporation—Advocate General—Party to suit—Act XX of 1863.

A testator, who died in 1826, directed his executors to hold certain property in trust for religious purposes of the Jains, to be applied as directed by the members, from time to time, of a local society called a "Punch," in whom was vested the management and control of the Jain temples. *Held*, that the members of a "Punch" might sue to have the dedicated property ascertained and secured; that the fact of a "Punch" not being a corporation was no objection to the form of the suit, as the members did not assert any personal right of ownership in themselves; that the Advocate General need not be made a party; and that no preliminary leave to sue is required under Act XX of 1863, section 18, that Act not applying to such a suit.

APPEAL from a decree passed by Mr. Justice KENNEDY in the original Civil Jurisdiction of the High Court, dismissing the plaintiff's suit.

The facts of this case are as follows:—One Hoolasseeloll Agurab, a shawl merchant and bill discounter, died in December 1865, without issue. By his will he directed the business to be carried on by his executors, to whom he gave ten annas of the estate beneficially, and the remaining six annas he disposed of as follows:—"Six (6) annas of my own, the profit that shall accrue every year the same you will disburse for Dharrum as follows: Annulars, two (2) annas profit to Sri Muuderjee of Calcutta of Tairopuntee Jainee Amnyas, which you will appropriate for the expenses of its Poojairees and Tailoohas and repairs and sales for Poojahs. The mooktears to apply the same are the kach brethren of the Tairopuntee Amnya. Two (2) annas you appropriate for the expenses of Sri Seckorjee's Mundeers, Poojairees, Tailoohas, Nowbutkhannah, repairs, gomastah, and sales for Poojahs. Two (2) annas at Ferozabad, &c., to the

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sa-dharamee brethren, such brethren as go there on pilgrim-
 you will give to them in a suitable manner and will expend
 this in the matters of the sa-dharamee. If there be
 then you will write such against my name in my six
 puttee. If there be profit in the six (6) annas you will appro-
 the same for the aforesaid expenses." The testator went
 give several bequests of the same kind and then continued:—
 the sums for pious acts that I have directed to be applied
 different persons, if any of them shall not apply any
 shall keep back any, all the Tairopunttee Amnya brethren of
 towns have the power to cause the same to be applied, or to
 an account thereof." The testator made one Hursahoy Babu
 a gomastah named Luckmee Chand, executors of his will, who
 out probate and entered into possession of the property in the
 ginning of 1827. Luckmee Chand died first, whereupon Hursahoy
 took possession of the whole property. Hursahoy died leaving
 will of which he made executor his only child Inder Chund
 proved it and entered into possession of Hursahoy's
 Inder Chund died in 1871, leaving two sons and a widow;
 the sons died in 1873, the other is the principal defendant in
 case, Chunnoo Lall. Hoolasseeloll also directed in his will
 in case the business should be discontinued, certain sums
 go to his executors and others, and "the whole of
 remainder shall be for the purpose of dharrum, mooktee
 the application whereof are the Calcutta Tairopunttee Amnya
 Punch brethren. You will apply the same with their
 but should the business cease and delay intervene in the
 cation of the money, then you will vest this money for dharrum
 in Company's paper or place to credit in the hands of some
 respectable shroff with the advice of the Punch brethren."

The plaintiffs alleged that various payments had been
 to the Calcutta Punch brethren from time to time by Hursahoy
 and Inder Chund, and that the business had been discontinued
 in 1876, by a decree of the High Court. The grounds on
 they sued and the relief claimed are set out in the following
 paragraphs of the plaint:—

"1.—The plaintiffs are the persons who constitute the Calcutta
 Tairopunttee Amnya Punch brethren, the said body being

is vested the management and control of the temples, ¹⁸⁷⁸
ments, and worship of the Degumbery sect of Jains, ^{PUSCH COW-}
which body forms the committee for the management of ^{HIS MULL}
Jain charities as well in Calcutta as in all other towns ^{CHUNNOO}
places in India. ^{LALL.}

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The only other Tairopunttee Amnya Punch in the Presi-
of Bengal is the Punch of and at Ferozabad, near Agra,
North-Western Provinces of India, but all the Jain tem-
d charities in India are under the management of the
Calcutta Punch, and by the usages and customs of the Jains
er of one Punch becomes, on going to any town where
a Punch, entitled, by virtue of his being a member of
ch at one place, to become and act as a member of the
of any and every town to which he may happen to go."

The plaintiffs are desirous, as such members as aforesaid
said Calcutta Tairopunttee Amnya Punch brethren, of
the will of the said Hoolasseeloll construed by this Honour-
court, and of having the rights of the plaintiffs as such
thereunder ascertained and declared," and of having the
dedicated to the said religious purposes and pious uses
ned and secured; and they prayed accordingly.

son, and Jackson, for the Plaintiffs.

(Advocate General), for the Defendants.

case was set down for settlement of issues, at the hearing,
the following judgment was delivered by

oy, J. :—

KENNEDY, J.

not know that I have ever met a document much more
to understand than the will produced in this case; in-
the interpreters who have had the duty of preparing the
tion annexed to the plaint, seem in some portions of it to
andoned the task as hopeless, and marked the passages as
igible. As matters stand, however, I feel myself relieved
a necessity of trying to ascertain the meaning of this
or, in my opinion, the plaintiffs have no such interest as
them to maintain a suit.

plaint sets out in the two first paragraphs the alleged

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 RIE MULL the case, *ante*.] I may observe that I think, if there were no
 v. objections to the suit, it would be difficult to maintain it with
 CHUNNOO uncertain and ambiguous a description of the character in
 LALL. the plaintiffs sue, and of the nature and constitution of the
 Judgment. to which they belong; and this is something more than a
 KENNEDY, J. technical objection, for if the account in the second paragraph
 true, every member of every Punch in India is, in fact, a member
 of the Punch here, and ought to be joined in order to bind
 as well as for other reasons.

I asked Mr. Branson if he thought himself able to show
 that the property in this case was *debutter*, and he presently
 relinquished that contention, which, indeed, I think on the face
 of the will, would have been wholly untenable. We then
 have not the plaintiffs in the position of *sebait*, and they do not
 claim, and it is clear that on the terms of the will they do not
 claim, property in the subject-matter of the suit. Their only
 claim or could claim is a right of management. Well, I think
 that it is a little new to me to find a suit for property in
 by a mere manager without some special power. The law does
 confer such power in the case of a *sebait*, (if he be a mere
 manager,) but then the property is vested in the deity, and
 the *sebait* merely represents him. Here, the property not
 being *debutter*, it is not vested in any one, and the only
 claim is to have the right of management, which is alleged
 to have been vested in them under the provisions of Section
 XX of 1863. It seems to me that this in itself is a sufficient
 objection to the present frame of this suit—*King of Siam v. Mahado*, 4 Rus., 225.

There is, however, a further difficulty which seems to me insurmountable; it was that which was most strongly pressed by the Advocate-General, and I did not hear any answer to it from Mr. Branson, save a faint suggestion as to the possible difference in Indian Law. It is this: the plaintiffs sue, not in their individual right but as the persons constituting the Punch. They do not allege that they were the persons who constituted it at the time of the testator's death; and, if

more than fifty years ago, it is in the highest degree probable that any of them were. They sue, therefore, it would be in their individual but in their supposed corporate capacity is no allegation that they have been legally incorporated and it is improbable that they have been. Well, in *Lloyd v. 6 Vesey*, 773, the Lord Chancellor distinctly held that ought not to permit persons to sue in a corporate name who do not fulfil it. That is a statement of the law as it stands in Westminster Hall, thence of the Supreme Court derivatively of this Court. The present case does not fall in any of the classes in which native laws are reserved; and, nothing has been suggested to me to show that it is different in this respect.

The plaintiff's strong point was that every mode of procedure was beset with difficulties, that he was unable to find an answer. I think it possible that there may be none. Some of the wills are so confused and absurd that it is probable there may be no person in a position to put them into effect. Mr. Justice NORMAN, in the case of the *Sikh* at Calcutta, has held, and in my opinion rightly held, that the provisions of Act XX of 1863 apply to religious endowments in agency towns, and to persons who are *de facto* trustees, and that, if it were a correct view of the case, the defendants or some of them might (if any liability attaches on them, and if the religious endowments created by the will) be sued under the 14th section; but in that case preliminary to the 18th section would be necessary. If these can be shown to be not religious but charitable gifts, possibly the defendant might sue; but when I am asked to take the plaintiff on a trade for upwards of fifty years in order to carry out the trusts of an unintelligible will, I confess that, I am not either inconsistent with my judicial duties to act as an adviser of the plaintiffs and to point out to them a course of procedure, if any such exists, I should not feel anxious to give them any advice in the matter. My duty is only to decide upon their present suit, and this seems to be a reasonable one; and even if they are able to get over these technical difficulties of form, I think they will probably find others of sub-

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 Judgment.
KENNEDY, J.

stance lying behind with which, however, I have at present nothing to do. I must dismiss this suit with costs. If I allowed it to stand I should have thought myself bound to allow the greater portion of the costs of the plaint, nearly two pages of which are taken up by setting out *in extenso* a decree of this Court, from the suit number at the top of the certificate of the Assistant Registrar at the bottom, decree being only material as showing that in fact the book left by the testator had been discontinued; a statement which might have been made in three lines.

The plaintiffs appealed.

Branson and Jackson, for Appellants.

Paul, (Advocate-General,) for Respondents.

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 April 1.

The judgment of the High Court (1) is as follows:—

In this case the plaintiffs brought a suit, in which they pray to have the will of one Hoolaseeloll construed, and the right of the plaintiffs, as members of a certain "Punch" under the will, declared; and they also prayed to have certain property, which had been dedicated by the will to religious purposes, ascertained and secured. The learned Judge in the Court below has dismissed the suit, (without settling any issues, and without going into evidence,) as we understand, upon four grounds: (1) that the plaintiffs do not shew in what right they sue; (2) that the plaintiffs are not a corporation, and cannot therefore claim to hold property by succession; (3) that the Advocate-General is not a party to the suit; and (4) that no leave of the Court to bring the suit has been obtained under section 18 of Act XX of 1863.

The right in which the plaintiffs sue is, in our opinion, sufficiently shewn. They describe themselves as the representatives, for the time being, of the Tairopunttee Amaya and his brethren, and as such, they claim to have, on behalf of themselves and others, the general management and control of the religious endowments belonging to the Degumbers sect of Jains. They show that the bequests, which they seek to enforce, are bequests which the testator directed to be applied under the management and direction of this very same Punch, to certain persons

(1) GARTH, C.J., and MARKEY, J.

connected with the worship of this sect. So far, therefore, there appears to us to be no objection to the frame of the suit; of course, when the issues are properly settled, the plaintiffs will have to prove this part of their case.

The next objection to the suit, in our opinion, also fails; we do not consider the object of the suit to be to assert any personal rights of ownership in the plaintiffs whatsoever. If any part of the plaint is ambiguous in this respect, all doubt as to this might have been removed when framing the issues. What the plaintiffs substantially seek is to have the trusts of the will, in which they are interested, (not beneficially, but as the representatives of their sect,) ascertained, and the performance of these trusts secured.

Nor do we consider that the practice of this Court requires that the Advocate General should be a party to a suit of this description. We have enquired into the matter, and far as we have been able to discover, this is not necessary. For example, in 1861, we find a person named Nolbanridoff filing a will on behalf of himself and all the other Armenian inhabitants of New Nakhewan in Rupia, to enforce certain bequests to the institutions of that city; and he only alleged, as his title to bring the suit, that he was one of the inhabitants. In that case a decree was drawn up and a decree made, without any concurrence of the Advocate General.

The last objection is no doubt supported by the authority of Justice NORMAN; but, having carefully considered the Act XX of 1863, we are unable to agree in the view that it was intended to apply to such a suit as this. The first thirteen sections of the Act clearly do not apply; and, although the language of section 14, which empowers any person interested in a religious endowment to sue a trustee, is general in its terms, yet we do not consider that the Legislature had in its contemplation to interfere with the procedure of the Supreme Court in reference to trusts concerning property which could not, under any circumstances, come under the direct control of Government. Such a suit as the present is not brought under Act XX of 1863, but under Ordinary Original Jurisdiction of this Court, inherited from the Supreme Court, and conferred upon the Supreme Court by

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its Charter; a jurisdiction similar in its general features to that of the Lord Chancellor in England. (See *Attorney General v. Brodie*, 4 Moore's Ind. App., 190.)

At the same time, whilst we believe that this is the correct view of the Law, as it stands at present, we cannot help thinking it extremely desirable that suits of this kind to enforce trusts which are of a public character should only be brought either by the consent of the Advocate General, or by the leave of the Court; such suits are very often vexatious, and open to abuse; and we consider that a procedure similar to that which is provided by Act XX of 1863 for suits to which that Act extends, might usefully be applied to all suits of this nature. This, of course, could only be effected by Legislative interference. We think that the learned Judge was wrong to dismiss the suit upon the grounds stated to him. The decree will, therefore, be set aside, and the suit remanded to be heard upon its merits. The costs of the appeal shall be costs in the cause.

[CIVIL APPELLATE JURISDICTION.]

April 18. KALEE CHURN GIRI PLAINTIFF
AND
GOLABI DEFENDANT

Act XX of 1863, section 14—Religious trusts—Endowments.

Act XX of 1863 only applies to certain religious trusts and endowments which had been or might come to be under the management of the Government; and section 14 of that Act, although in its terms it appears to be more general than the earlier sections, applies in fact only to the same religious endowments to which the rest of the Act applies. *Punch Cowrie Mull vs. Chunnoo Lall*, 2 C. L. R., 121, cited and followed.

REGULAR APPEAL from a decree passed by the Judge of the District Court at Dacca, dismissing the plaintiff's suit.

The plaintiff set forth that before the accession of the British Government, one Shumambun Purmahungso Paree Brojak established a *guddee*, and a *shivalay*, and an idol Shidhessuri T. Kurani, at his *akra* at Khilgram; that in order to maintain

of these idols, lands were assigned by the Nawab and by zemindars as *lakehraj* and *debutter* properties; that with fits thereof the said Shumambun and, after his death, his statives and other mohunts had regularly performed the of the said *guddee* and temples; and that the defendant, low of the last mohunt, having obtained the managership of the said *guddee*, was leading a life of prostitution, appropriating the profits of the *debutter* properties, and using the shrine. The plaintiff prayed that, under section XX of 1863, the defendant should be removed from office of trustee; that the plaintiff (who claimed to be entitled to the office) or some other person approved of by the Court should, under section 5, be appointed thereto; and, under section 5 of the same Act, for an account.

Having been granted to institute the suit under section XX of 1863, the case came on for hearing, when the judgment was delivered by the learned Judge:—

The case has been brought under section 14, Act XX of 1863, to discharge the person in charge of a certain *akra* on the ground that she is an incompetent person, and has grossly abused her position.

The first issue raised is, whether this *akra* is one that comes under the purview of Act XX of 1863 or not. Act XX is an Act to enable Government to divest itself of the management of religious endowments, and all the sections of the Act appear to refer only to such endowments as would, under Act XIX of 1810, have come under the management of Government. Now it does not appear that this *akra* was ever under the management of Government, or that the State interfered in the management of its concerns; but for the present instance, therefore, it would appear that this *akra* is an endowment that comes within the purview of this Act. The wording of section 14 of the Act is, to some extent, larger than that of the other sections of the Act, and looking at that section alone it would appear to entitle the Court to take cognizance of any case of misfeasance or breach of duty against the manager of any religious endowment, whether that was a religious endowment falling within the purview of the Act or otherwise; and if it were so, no doubt the

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present suit could have been entertained; but I think this clear that after the words "any temple" in section 14 the "to which the provisions of this Act shall apply" must be understood; and my reason for thinking this is that the law gives me no means of enforcing any order I might make, in the case of an endowment falling within the provisions of the Act. To take the case of the present *akra* I might make an order for the re-institution of the worship, and if that were done I might remove the present *sebat*, but there I must stop, as the result of my act would be to keep the *akra* absolutely empty and prevent all worship and to deprive any person of any right to meddle with the *akra* until some person had established a right to succeed to the vacant *akra*.

"The pleader for the petitioner refers to section 5, and says that after removing the present *sebat* I should be entitled to appoint a manager to take charge of the *akra* under that section; but that section says, whenever a vacancy shall occur in the office of any superintendent to whom property shall have been transferred under the last preceding section, the Civil Court may appoint a manager, &c., but in the present case it is clear that no such property has been transferred; and, therefore, I fail to see how I can have jurisdiction under that section to appoint a manager in the present case.

"It appears, therefore, to me clear that if I regard section 5 as applying to any trust indiscriminately, I must arrive at the conclusion that the law gives me the power to pull down, but not to build up, the power to discharge the manager, not to make provisions for carrying on the trust after the manager has been discharged, a power so important that I cannot suppose it was contemplated by the law. I think, therefore, that this suit should be dismissed, the *malibog akra* not being within the purview of the Act. I regret that I did not notice this point before, and should not have given permission for the institution of the suit."

The plaintiff appealed to the High Court.

Baboo Bycont Nath Dass, for Appellant.
Baboo Oomakali Mookerjee, for Respondent.

judgment of the Court (1) was delivered by

J. :—

It is not framed in such a way as to accord with the law which was lately laid down by Mr. Justice and myself, after a good deal of consideration, in the *Panch Cowree Mull vs. Choones Lall*, 2 C. L. R., 121, in my learned brother here and myself believe to be the law of it.

It is not one of those for which Act XX of 1863 is to provide. That Act only applies to certain religious and endowments, which had been or might be under management of the Government, and we held in the case *Cowree Mull* above referred to, that section 14 of that Act, though in its terms it appears to be more general than the others, applies in fact only to the same religious trusts and endowments to which the rest of the Act applies, and in such a case as this would not fall within its

assuming that this case does not come within the Act, the way in which the plaintiff could frame his suit is this, amongst other persons, is interested in the proper worship of the idol, and in the religious trust being carried out in accordance with the terms,—whatever they may be,—of the endowment; that this person, the defendant, who is now in charge of the *guddee*, has neglected the worship and abused the trust, praying the Court to remove her from the *guddee* and appoint some proper person, under any direction which the Court may think it right to give, to carry out the trusts, and if reason there be, to call upon the defendant to

the suit is not framed in this way; it is framed with a view to enforce certain personal claims of the plaintiff himself. It is to be placed on the *guddee* instead of the defendant, and he does not even show that he is interested in the worship of the temple, or aggrieved by its not having been

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Therefore, as the plaintiff has asked that he may be allowed to withdraw this suit and bring a fresh one, we will make order allowing him to do that, on his paying within a month from this date the costs of this appeal. Otherwise the appeal will be dismissed with costs.

[CRIMINAL APPELLATE JURISDICTION.]

April 28. **SOFIRUDDEEN AND OTHERS.** APPELLANTS

Confessions to Magistrate—Misconduct of Police—Conviction solely on confessions to Magistrate.

Where the only evidence in a Sessions trial was confessions made to a Magistrate but subsequently retracted, and it was established that the Police misconducted themselves in the search of the houses of the prisoners who confessed and of others under trial, and produced evidence which was rejected as false, it was held that the prisoners could not safely be convicted on their own statements without any corroboration.

CRIMINAL APPEALS from the order of the Sessions Judge at Backergunge, convicting the appellants under section 395, of the Penal Code, of dacoity, and sentencing them each to seven years of rigorous imprisonment.

The appellants, with others, were tried on a charge of dacoity by the Sessions Judge of Backergunge, by whom, in concurrence with the opinion of the Assessors, they were convicted. Some of the others were acquitted in the Sessions trial, and the Sessions Judge agreed with the Assessors in rejecting as untrustworthy a portion of the evidence relating to the finding of various articles said to be part of the stolen property in the house of the accused. The conduct of the Police was unfavourably commented on, both as regards the house-searches and the preparation of the list of the stolen property said to have been furnished by the complainant. The appellants, however, were convicted on their confessions to the Magistrate, which were uncorroborated by any reliable evidence in the case, those who had not confessed being acquitted.

Baboo Doorga Mohun Dass for the Appellants.

The judgment of the High Court (1) was delivered by

MARBY, J. :—

In this case the conviction of the three prisoners rests wholly on their confessions to the Magistrate. Now the Sessions Judge and the Assessors, although they thought fit to act upon the confessions, have come to the conclusion that the Police officers were guilty of misconduct in having produced evidence with regard to the identification of the property which was false, that misconduct being established against the Police, we think it is not safe to act upon the confessions without any corroboration at all.

Those confessions were made on the 1st of November 1877, but they were retracted before the case left the Magistrate's Court, when the prisoners were about to be committed to the Sessions, all these three prisoners asserted their innocence. When the houses of the three prisoners were first searched nothing was found. On a subsequent occasion the prisoners' wives are said to have produced certain property, but even the property so produced did not tally with that which the prisoners confessed to having taken.

Under these circumstances, there being absolutely no corroboration whatever of those confessions, and there being admitted misconduct on the part of the Police, we think that we ought not to act upon the confessions alone, and that the conviction cannot be supported. The result is that the conviction and sentence must be set aside, and the prisoners released.

(1) MARBY and PRINSEP, J.J.

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BUDDEN.

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MARBY, J.

[CIVIL APPELLATE JURISDICTION.]

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AJOODHIA LALL AND OTHERS DEFENDANT
AND
GUMANI LALL AND OTHERS PLAINTIFF

*Partition by Collector—Private Partition—Batewara—Regulation XIX of
section 30—Valuation of Suit—Boundaries not mentioned in Plaint.*

It is not correct to say that, under section 30 of Regulation 1814, the Collector is not at liberty to make any partition where owners have already partitioned the lands amongst themselves. The true meaning of the section is that the Collector must be guided by the nature of the estate in applying the rules contained in the preceding sections of the Regulation; and that where estates are not in common tenancy, only a portion of those rules will apply. If parties have divided the lands without agreeing as to the shares of Government revenue to be paid by them, respectively, all the Collector has to do, when a partition has been applied for, is to make an arrangement of the revenue in proportion to the interest of each share. If they have divided the lands and arranged amongst themselves the portion of the Government revenue which each is to pay, it is for the Collector to accept or reject that arrangement. The Court has nothing to do with the matter.

A suit should be valued according to its real character. If the plaint is so worded as that, taken strictly, the valuation would be such that the Court in which the plaint was filed would have no jurisdiction, the mere miswording of the plaint will not oust the Court of jurisdiction.

Where the object of a suit is to prevent the plaintiff's right in certain lands from being infringed upon, the boundaries of the lands should be given in the plaint.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Patna, affirming that of the Second Sudder Munsif of that district.

In this case the plaintiffs were shareholders with the defendants of a certain mouzah, which had been partitioned amongst the parties some considerable time previously. The defendants applied to the Collector for a partition.

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 LALL
 Judgment.

has put upon it. The previous sections of the Regulation contain rules for the guidance of revenue officers in partitions between co-proprietors. Section 30 then declares that these rules generally are applicable to a certain class of estates, namely, those held in joint tenancy, but that so far as the rules cannot be applied to the class of estates not held in common tenancy in which the lands have been already divided and that in such cases only a portion of the rules is to be in force. It is quite clear from that section that the mere fact that the parties had by private agreement divided the lands among themselves is no bar to the separation of their lands in respect of Government revenue which results from proceedings before the Collector under the partition law. If it appears that the parties have divided the lands without making any arrangement in respect of the proportion in which the Government revenue has to be paid by them, what the Collector is to do is simply to make an assignment of the revenue in proportion to the several portions of the land. If the parties have gone further and have not only divided the lands but have agreed among themselves as to the proportion in which the revenue has to be paid, it may well happen that the several assignments of revenue agreed to will not be accepted by the Collector can accept with due regard to the protection of the interests of the Government, and in that case he will necessarily refuse to make any partition: but this is not a matter for the consideration of a Civil Court. All that a Civil Court can do is to declare how the rights of the parties stand *inter se*; it is for the Collector or other revenue officer to determine on the state of facts put before him, a partition consistent with the protection of the Government revenue is possible or not. Subordinate Judge appears to have taken the same view of the matter as the Moonsiff.

The first question raised here is as to the jurisdiction of the Civil Court. It appears to us that, although the plaintiff did not ask for the stay of the butwara, it must not be taken that the suit is to be valued on the valuation of the entire property. He asked for that which he had no right to ask; and the mere fact that the plaintiff so misworded the plaint, does not alter the real character

which is, in effect, one for a declaration of his rights in order that those rights, whatever they may be, may be protected from being trespassed upon; and his interest in the matter is limited to the amount of his share in the estate. Another objection taken is that the plaintiff has not given in his plaint the boundaries of the land in suit. There is, no doubt, great force in this objection, and it is evident that the suit is badly framed. The object of the suit having been to prevent any interference with certain lands alleged to have been separately owned and held and known as Puttee Telaram, it was necessary for the plaintiff to annex to his plaint a schedule of the lands which he alleged to have been affected. The decree in one sense is inoperative, because if it is taken to the Collector with a view to protect the interests of the plaintiff the answer of the Collector will be that he is unable on the face of the decree to say where the particular lands lie in respect of which the plaintiff has obtained a declaration of title, and that it is not for him to hold an inquiry on the matter. On the other hand, this decree may go too far; it appears to us to be capable of being used to defeat the defendant's right to a butwara altogether, because it declares that "the defendants are hereby precluded from demanding a butwara which shall affect the share and the land which it includes." And therefore they are precluded from going on with their butwara at all, until it is shewn that that share is which is to be protected by the decree. Under these circumstances, we think that the only thing to be done is to send the case back to the first Court, in order that that Court may call upon the plaintiff to file a schedule of the land comprised in Puttee Telaram within a limited time, and then if a dispute arises as to this land or any portion of it being without that share, to fix a day for the parties to give evidence on the matter. The form which the decree will eventually take, will be that certain specific lands are declared to belong to the divided estate known as Puttee Telaram. It is not necessary to make any order on the Collector, because the Collector will of necessity follow his proceedings under the butwara law in accordance with the declaration of the Civil Court. We make no order as to costs in this Court.

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Judgment.

[CIVIL APPELLATE JURISDICTION.]

1878
February 6.

SHURNO MOYEE DASSEE AND ANOTHER . . DEFEND.

AND

UMA SOONDERY CHOWDRAIN . . . PLAINTIFF

Money bond—Payment of Debt by Ijarah lease—Reduction of Principal—Construction of Contract.

Defendants were indebted to the plaintiff in the sum of Rs. 1,400. With the object of liquidating this debt with interest at 12 per cent per annum, the parties executed a bond whereby it was agreed that the defendants should grant an ijarah lease of certain property for the fourteen years to the plaintiff's husband; and that the rent reserved on the lease should be paid by the lessee to the plaintiff, during the term, in annual payments each of Rs. 83-12: *Held*, that, on the proper construction of this agreement, the semi-annual instalments were to be paid first to the reduction of the principal money due, and not to the payment of the interest.

SPECIAL APPEAL from a decree passed by the Judge of the District of Jessore, affirming that of the Subordinate Judge of that District.

Baboo Sreenath Dass and Baboo Bungshee Dhur . . . Appellants.

Baboo Doorga Mohun Dass, for Respondent.

The facts of the case are sufficiently set forth in the judgment of the High Court (1), which are as follows:—

The question raised in special appeal turns upon the construction of the bond upon which the plaintiff has brought the case. The bond is dated the 23rd Chytr 1267. It appears that the defendant in this case borrowed from the plaintiff, under the bond, Rs. 1,400, stipulating to pay interest at the rate of 12 per cent per annum. It further appears that on the same date the defendant granted an ijarah lease of a mehal to the plaintiff's husband, in which the husband of the defendant agreed to pay to the plaintiff Rs. 83 rupees and 12 annas in the month of Bhadro, and Rs. 83 rupees and 12 annas in the month of Pooos each year during the whole term of the lease.

(1) BIRCH and MITTER, J.J.

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 SOONDREY
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 Judgment.

that according to the usual practice (and there is nothing in the bond which has modified this practice) the payments which made by her husband should be first appropriated for the reduction of the interest due under the bond, and the surplus for the reduction of the principal. On the other hand, the defendant says that it was the intention of the parties as expressed in the bond that the payments mentioned in it should be first applied to the reduction of the principal and then the balance, if any, to the interest.

We think the construction for which the defendant contends is the right construction. In the first place, it is distinctly stipulated that the money due under the bond (and that evidently means principal and interest) should be paid off by the annual payments of Rs. 83-12 annas each from the year 1270 to the year 1280. If we adopt the plaintiff's construction it is quite clear that this condition would be wholly meaningless because the payments mentioned in the bond amount to Rs. 83-12 annas per annum, whereas the annual interest at the stipulated rate would amount to Rs. 168. Then again the last part of the bond is quite clear on this point. It is stated therein that the object of the ijarah transaction was to liquidate the whole principal and interest of the bond money. For the reasons mentioned above, this would be also meaningless if the construction contended for by the plaintiff be adopted. We think, therefore, that the reasonable construction which ought to be put on this bond is that it was the intention of the parties that the two annual payments would go first to the reduction of the principal, the balance carrying interest at the stipulated rate. The whole amount borrowed with interest would thus be paid off from the ijarah rents. We are further supported in this view by the fact that if this mode of calculation is adopted, the bond money with interest would be fully paid off during the term of the ijarah lease. It is admitted that these two annual payments mentioned in the bond have been regularly made by the plaintiff's husband to the plaintiff. The plaintiff's suit must therefore be dismissed with costs. Accordingly we decree this special appeal and reverse the judgment of the lower Courts with costs.

[CIVIL APPELLATE JURISDICTION.]

MOORSHED HOSSEIN AND OTHERS . . . PLAINTIFFS ;

AND

KNARAIN SINGH AND OTHERS . . . DEFENDANTS.

1878
February 21.*Servitude—Easement—Right to flow of water.*

Where A has a right to discharge the surplus rainfall from his land on to the land of B, no length of time will give B a right to compel A to send the water on ; provided that A does not interfere with any portion of the water which flows from his land to that of B in a natural and defined channel.

The servient owner cannot prevent the dominant owner from putting an end to the servitude at any time he may think proper.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Gya, reversing that of the Second Sudder Moonsiff of the district.

The defendant in this case had on his land certain ponds with channels cut from them for irrigation purposes. In these ponds the rainfall used to collect, and the defendant, when he had obtained all the water he required for his land, was in the habit of allowing the surplus to flow on to the lands of the plaintiff which lay at a lower level. Latterly, the defendant diverted the surplus water, so that it should not flow to plaintiff's lands, and hence the present suit.

Mr. M. L. Sandel, for Appellants.

Baboo Kally Mohun Doss, *Baboo Nil Madhub Sen*, and *Baboo Chandro Nath Roy*, for Respondents.

The judgment of the High Court (1) is as follows :—

It appears to us that this special appeal should be dismissed. There is nothing on the face of the plaint to show from what source the waters collected in the Ahurs of Mouzhas Pukharee and Bawan were derived, so that we must take those Ahurs to be nothing more than reservoirs for the rain-water falling on

(1) *AINSLIE and McDONELL, J.J.*

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v.
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SINGH.

Judgment.

the surface of those two villages. The proprietors of villages are clearly entitled to make every possible use of the rain-water which falls on the surface of their own estates and they are not in any way bound to allow any portion of it to pass out for the benefit of other proprietors, provided that the rain-water is kept distinct from waters entering estates and flowing through them in a natural channel. If there is any mixture in such a natural channel of the waters flowing therein with the waters derived from the rainfall, the exclusive right to the latter ceases to exist after it has reached the natural channel. Neither the plaint nor the map prepared in the course of the trial below shows that there is any natural channel by which water passes down from beyond the boundaries of the villages into the Abur of the defendants. In fact the map, when analysed, amounts simply to this, "that, whereas you, defendants, have for a long period of time had the privilege of passing waters in excess of your requirements through my property, now that you have chosen not to allow those excess waters to pass, I require the Court to compel you to make use of the servitude which you have acquired over my property." It seems to me that it is sufficient to state the nature of the claim to show that there is nothing before the Court on which it would make a decree in favour of the plaintiff. The plaintiff cannot convert that which is a servitude binding his own property, into a right to be exercised by the owner of the property who has acquired such servitude.

[CIVIL APPELLATE JURISDICTION.]

MEERUNNISSA KHATOON AND } JUDGMENT-DEBTORS ;
 OTHERS }

1878
 February 21.

AND

MEER MAHOMED HOSSEIN AND } DECREE-HOLDERS.
 OTHERS }

*Execution of Decree—Payment by Instalments—Instalment Bond—
 Kistbundi.*

An agreement between the parties to a decree to reduce its amount, or to give time for its payment, or that the amount shall be paid by instalments does not amount to a varying of the decree itself.

A having obtained against B a decree for the payment of money, a kistbundi was inserted in the decree, by which it was arranged that the amount of the decree should be paid by instalments of Rs. 5,000. A considerable remission was allowed to the judgment-debtors, and some reduction was made in the amount of interest payable. The kistbundi contained an express proviso that on default of payment of three consecutive kists the whole amount due under the bond was to become at once realizable; and it also provided that in case of default the amounts due were to be recovered by execution, to which the judgment-debtor was to make no objection. Certain instalments having fallen due, the judgment-creditor sought to enforce the kistbundi by execution: *Held*, that he was entitled to do so; that he was not bound to bring a regular suit; and that a provision in the bond by which payment might be enforced against property which could not have been attached and sold in execution of the decree, did not prevent the decree-holder from proceeding by execution so long as he did not seek to enforce that provision.

REGULAR APPEAL from an order passed by the Judge
 Dacca.

In the judgment appealed from, the learned Judge set out the facts contained in the above head note, and then proceeded:

The first point taken is, that a kistbundi cannot be enforced by execution, but must be made the subject of a separate suit. Looking through the decisions on this subject, it appears to me that in only two of these has it been laid down absolutely that a kistbundi can or cannot be enforced in execution. *Tariss Biswas v. Kalidas Bangen*, 2 B. L. R., A. C., 223, is an authority that a kistbundi can be enforced. *Madhub Dundput vs. Madhub Khan*;

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 v.
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 HOBBIN.

Statement.

15 W. R., 542, is a decision that it cannot. The first case before me is from 2 W. R., S. C. Ref. 1. In that case it appears that a kistbundi had been inserted in the decree. Subsequently parties entered into a new kistbundi which they sought to a part of the record. The High Court held that they could substitute a new kistbundi for the kistbundi entered on the d. The next decision quoted was the Full Bench decision in 13 V 843. In that case PEACOCK, C. J., said: "I should have thought that a Court in execution was bound to execute the decree found it, and was not justified in adding to, or in any way altering the terms of, the original decree in consequence of any change of the parties." (I ought also to notice *Janki vs. Sreenath* 5 W. R., Mis. 19, which is an authority in favour of the kistbundi being enforceable in execution). I think it is impossible to say the meaning of Chief Justice is that a decree may not, if he chooses, forego a portion of his decree by debarring himself from the privilege of executing his decree at all, and that it is not so, may, I think, clearly be gathered from a remark of the Chief Justice at page 47. There he says: "So, in the case of a decree, if a man binds himself to execute a decree within a certain period, he must take care if he wish to execute the decree at all, not to bind himself not to execute the decree for a longer period than the period within which the law would allow him to execute it." From this I think it may plainly be inferred that a man may bind himself not to execute his decree for a certain time, and may execute it after that time has elapsed, provided he does so within the period which the law allows for execution. In the present case, it appears to me that all the decree-holder has done is to bind himself not to execute the decree except by instalments, and to allow the judgment-debtor some conditional relief both in respect of the principal sum and of the interest decreed. I do not see that this is an alteration of the decree, but it may be a modification of the manner of executing the decree, but in all essential points the decree seems to me unchanged. "Then there comes the decision in 2 B. L. R. 100. Mr. Justice LOCKE there says, 'the kistbundi was for the benefit of the debtor, and we think he cannot, on his failing to

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Court allowing execution to proceed in this case. The kistbundi referred to has not extinguished or put an end to the decree. On the contrary, the kistbundi expressly provides that the decree shall in certain events be executed in a particular way. The decree-holders, who are the respondents before me in issuing execution have abided by that arrangement. An agreement between the parties to a decree to reduce its amount or to give time for its payment, or that the amount shall be accepted in instalments, is not, in our opinion, a varying of the decree within the meaning of the authorities to which our attention has been called. A decree-holder may give his judgment-debtor the benefit of such an agreement in the course of executing the decree, and is not compelled to bring a fresh suit to enforce the agreement as contended for by the appellant. The kistbundi no doubt contains, besides such an agreement as I have mentioned on the part of the respondents, a further agreement on the part of the appellant that the former shall have a right for the recovery of his money, not only against the property of her deceased husband as provided by the decree, but also against a certain portion of her own property. We think that this circumstance does not prevent the respondents from executing their decree in accordance with the right reserved by them in the kistbundi. If and when they endeavour to procure payment of the money for which they have issued execution by attaching and selling the immoveable property of the appellant the question will then arise whether they can do this in the course of executing the decree, or must resort to a separate suit to enforce the kistbundi. This question does not now arise, and we pronounce no opinion upon it. The respondents, in executing the decree as they have done, give the appellant the benefit of that part of the kistbundi which is in her favour, and are not seeking to have the benefit of that part of it which is in favour of themselves. The appeal will, therefore, be dismissed with

NOTE.—The law on this point is now contained in section 210, Act X of 1877, which is to the following effect :

"210. In all decrees for the payment of money, the Court may

Maient reason order that the amount shall be paid by instalments, with or without interest.

And after the passing of any such decree the Court may, on application of judgment-debtor," made within six months from the date of the decree, XV of 1877, Sch. II, Art. 175 "and with the consent of the decree-holder, that the amount decreed be paid by instalments on such terms as to the amount of interest, the attachment of the property of the defendant, or the giving of security from him, or otherwise, as it thinks fit: Save as provided in this section and section 206, no decree shall be altered at the request of the debtor."

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Note.

[CIVIL APPELLATE JURISDICTION.]

UNDER NATH CHOWDHRY AND }
OTHERS }

PLAINTIFFS; February 26;

AND

BARTHANUND THAKOOR AND OTHERS . . DEFENDANTS.

By Reversioner—Hindu Widow—Sale for Arrears of Government Revenue—Fraud—Act IX of 1871, sch. II, art 95.

A, a Hindu widow in possession of a widow's estate, leased the property to B, who afterwards bought A's interest in the property at a sale in execution of a money-decree. B then made default in payment of the Government revenue; the estate was sold and purchased by C. In a suit brought by the next heir in reversion against B and C after the death of the widow, it was alleged that B was the real purchaser at the sale for arrears of revenue; and that he had made default in payment of the arrears in order that the estate should be sold and the plaintiff's reversion destroyed: *Held*, that proof of these facts would entitle the plaintiff to a decree on the ground of fraud.

Art. 95 of sch. 2 of Act IX of 1871, has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of that act. It does not cut down the ordinary limitation of twelve years, (allowed for instituting a suit for the possession of land,) in a case where the plaintiff has been kept out of possession by the fraud of the defendant.

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NUND
THAKOOR.
Statement.

SPECIAL APPEAL from a decree passed by the Judge of Purneah, affirming that of the Subordinate Judge of that district.

The facts of this case are as follows:—Nobo Kishore Chowdhry and Juggadanund Chowdhry were uterine brothers, joint and undivided. The former died childless, leaving a widow, Annapurnah; the latter left one son, Gour Nath Chowdhry, who became entitled in possession to his father's 8-annas share, and in reversion on the death of Annapurnah to the other 8-annas. This was the state of matters on the 6th of May 1862. On that day a partition lease was granted by Annapurnah to one Karoo Lall Thakoor, which, after some litigation, was held to be valid to the extent of the widow's interest in the 8-annas share. At the same time the permanent settlement of the whole 16-annas was under consideration, and was finally concluded with Gour Nath and Annapurnah. At a sale in execution of a money-decree against Annapurnah, Karoo Lall purchased the widow's interest in the 8 annas, and had his name substituted for hers in the Collectorate. On the 15th of February 1869, at a sale in execution of a decree against Gour Nath, the entire interest of Gour Nath in the 8 annas was purchased by the sons of Karoo Lall, who had their names substituted for that of Gour Nath in the Collectorate. They afterwards failed to pay Rs. 33, the Government revenue of the mehal, which was in consequence put up for auction on the 22nd of August 1870 and brought by one Shib Pershad Thakoor, a cousin of the sons of Karoo Lall, who lived with them in the same house. About this time Gour Nath died, leaving the plaintiffs, his sons, him surviving, and some time afterwards, Annapurnah died on the 22nd of February 1871. This suit was instituted against the sons of Karoo Lall and against Shib Pershad Thakoor for possession of the 8-annas held by the widow, and for mesne profits, on the ground of fraud. The suit was dismissed in both the lower Courts. Plaintiff then brought this special appeal.

Baboo Kally Mohun Dass, and Baboo Juggadanund Mookerjee, for the Appellant.

Baboo Gopal Lall Mitter, Baboo Chunder Madhub Ghose, Baboo Hem Chunder Banerjee, and Baboo Taruck Nath Sen, for Respondents.

judgment of the High Court (1) is as follows :—
 plaintiff, Chunder Nath Chowdhry, brought this suit for
 purpose of recovering possession of immoveable property to
 which he was entitled, as heir and reversioner under the Hindoo
 law, after the death of Mussamut Annapurnah Chowdhraia, widow
 of Nobo Kishore. It appears that Juggadanund, paternal grand-
 father of the plaintiff, and Nobo Kishore had been jointly entitled
 to the property in question, and that on the death of Nobo Kishore
 Annapurnah, succeeded as widow to his interest. In the
 lifetime of Annapurnah, Karoo Lall Thakoor, father of the defend-
 ant Karthannund, obtained from her a putnee talook of her
 property, and, it is said, took possession of the entire mehal,
 notwithstanding that Gour Nath Chowdhry, father of the
 plaintiff, also had a share in the property. A dispute took place
 between them, and there was a conflict as to the settlement; but
 the settlement was made by the Collector with Gour
 Nath and with Annapurnah as widow of Nobo Kishore. There-
 upon, litigation as to the validity of the putnee granted by
 Annapurnah to Karoo Lall, which ended with a declaration that
 the same was good for the lifetime of the widow and not further.
 Subsequently a decree having been obtained for money against
 Annapurnah, her right, title, and interest were
 sold in execution, and purchased in the name of Karum
 Chokhtear; and there seems to be no doubt that the
 sale was made on behalf of the defendant. There was also
 a decree against Gour Nath; and, in execution of the decree
 against him, the execution-creditor procured the sale of his
 property rights in the property in the hands of Annapurnah.
 It happened, however, that Annapurnah survived Gour Nath,
 and no purchaser of such right consequently took nothing. As the
 matter to which the present suit relates was wholly in the
 hands of Karoo Lall after the death of Annapurnah, it is
 alleged that he fraudulently made a default in the payment of
 the Government revenue due, and allowed the property
 to go up to sale, and thereupon it was purchased by Shib
 the third defendant, who is admitted to be cousin, and
 is alleged to be mere *fursi*, for the other defendants. Under

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Judgment.

(1) JACKSON and CUNNINGHAM, J.J.

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 Judgment.

these circumstances, the plaintiff contends that he is entitled to recover this property from the hands of the defendants, and sues to recover it. The defendant Thirthanund, for himself and his younger brother, put in one answer; and Shib Pershad put in another. Both contended that Shib Pershad was an independent person distinct from the principal defendant, and had made the purchase for himself; and they urged that the property having been sold for arrears of Government revenue, the purchase by Shib Pershad could not be impeached. Both the Courts below dismissed the suit. The Judge, in the third paragraph of his judgment, says:—"It is quite unnecessary to go at length into questions of limitation, &c., which the Subordinate Judge has discussed; it seems to me that the revenue sale as a bar itself utterly bars this suit. He then goes on: "In the first place, when it occurred, it may be doubted whether Thirthanund was the person responsible for the revenue, for he was merely Annapurnah's putnidar, and, at the instance of the father of the plaintiff, a competent Court had declared that the putnai title continued to last for Annapurnah's life time. According to plaintiff's allegation, she died on the 21st February 1869, (1) and the plaintiff and herself were, therefore, rightful reversioners in 1871, when the sale took place and the arrears fell due. But, be that as it may, there is no sort of privity as between joint holders in the shares of the revenue of an estate; and, whatever may have been Thirthanund's motives, I do not think that his default can be questioned. The plaintiffs had every opportunity of coming forward and looking after themselves. The Judge has omitted to notice that in the first place this property was unquestionably in the hands of Karoo Lall, father of the defendant Thirthanund, at the time of Annapurnah's death, and he also has forgotten that on the occurring of the default, the property was sold, the plaintiff came forward and asked to be allowed to put in the Government revenue and have the arrears stayed; which, for what reason it is difficult to understand, the Collector disallowed. Now it seems clear that, if the plaintiff succeeded in proving that the principal defendant's father

(1) The date given in another part of the record is the 22nd February 1871.

[CIVIL APPELLATE JURISDICTION.]

1878 RAM CHUNDER SEN AND OTHERS . . DECREE-HOLDERS

AND

KOOMAR DOORGA NATH ROY . . . JUDGMENT-DEBTS

*Interpretation of Decree—Costs—Separate defences—Separate sets of
Alteration of decree in execution.*

Where a decree of the High Court directed that the respondent (plaintiff) should pay to the appellants (the defendants) "the costs incurred by them in the lower Court:" *Held*, that the costs referred to were those which were specified in the decree appealed against as the costs incurred by the defendants.

If several defendants have severed in their defence, and the Court has specified the costs incurred by each of them, the costs incurred under the above directions will be their several costs. If they are joined in their defence, or though they have severed their defence the lower Court has specified a single set of costs as the only costs allowed, it will allow or treat as costs in the suit, then the costs payable will be a single set of costs.

Under the Code of Civil Procedure it is the duty of the first Court to ascertain the costs of suit, i.e., the costs of all the parties to the suit, when the first Court does not consider that the defendants have severed in their defence and properly employed different vakeels, it ought not to allow more than one set of costs to the defendants; it should only specify in its decree the costs so allowed.

Where the lower Court has improperly awarded separate sets of costs to defendants who have severed in their defence, the attention of the Appellate Court should be drawn to this circumstance before the appeal is passed. It is too late to raise the objection when the decree is being executed.

REGULAR APPEAL from an order passed by the Officer Subordinate Judge of Moorshedabad.

A suit which was instituted against A and B in the District Court was decreed with costs. In that suit A and B defended separately, filed separate defences, and employed different vakeels; the Court ordered them to pay separate sets of costs. On appeal to the High Court the judgment was reversed.

The respondent was ordered to pay A and B the costs incurred by them in the lower Court. When the decree of the High Court came to be executed by A against the original plaintiff, he objected that the lower Court was wrong in assessing the costs of the defendants separately. The objection was disallowed by the lower Court, but this decision was reversed on appeal by the High Court. Afterwards, when B came to execute the High Court's decree for his separate costs, the original plaintiff made the same objection as before, and the objection was allowed. He then brought this special appeal.

Baboo Hurry Mohun Chuckerbutty, for Appellant.
Baboo Gooroodoss Banerjee, for Respondent.

The judgment of the Court (1) was delivered by

WHITE, J. :—

The question raised in this Miscellaneous Regular Appeal is as to the true construction of certain words in a decree of this Court, which had reversed a decree of a lower Court and directed that the respondent should pay to the appellants the costs incurred by them in the lower Court." These words, although they have been the subject of animadversion in some quarters, happen to be the words that are universally used in the decrees pronounced on the side of the High Court when it gives to the successful party the costs in the lower Court. They are, moreover, the very words which are used in the Code of Civil Procedure when dealing with the question of such costs. In construing the words we must give them a fair and reasonable meaning, and must not be led away by the hardship of the particular case now before us. In our opinion, the words mean the costs which are specified in the decree appealed against as the costs incurred by the defendants. If they have severed in their defence, and the lower Court has specified the costs incurred by each of them, the costs payable will be their several costs. On the other hand, if they have joined in their defence in the lower Court, or although they may have severed in their defence, if the lower Court has specified a single set of costs as the only costs of the

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defendants which it will allow or treat as costs in the suit, then costs payable will be the single set of costs. It is the duty of first Court, under the Code, to ascertain the costs of the and these words can only mean the costs of all the parties the suit, although no doubt unless the first Court considers the defendants have properly severed in their defence and properly employed different vakeels, the Court ought not to allow more than one set of costs to the defendants, and should only say in its decree the costs so allowed.

In the present instance the first Court has assessed and specified in its decree the costs of the appellants separately; they had unquestionably put in separate written statements appeared by distinct vakeels. But it is contended now, when the decree of the High Court is under execution, that the High Court ought only to have allowed to the defendants and appellants in its decree one set of costs, because their defence was common to both of them, and the employment of more than one vakeel was unnecessary. If the lower Court made a mistake in this respect we are of opinion that when the appellate Court reversed the decree made by the lower Court, and proceeded to decree the costs incurred by the appellants in the lower Court, the respondent's vakeel should have drawn the attention of the High Court to the fact that the lower Court had erred in the above respect and should have asked the High Court to allow only one set of costs to the appellants in the Court below. This, however, was not the course adopted by the vakeel of the respondent, and although it is not improbable, supposing what the respondent says is true, that the High Court, if applied to at the right time, would have made such an order, the fact remains that no such order was made, but the decree was allowed to stand in the ordinary form. We cannot now, when the decree of the High Court is being executed, speculate what direction it might have given on the subject, if something had been brought to its notice at the proper time by the vakeel who appeared for the respondent which it is clear was not brought to its notice. That we have to do now is to give its full and proper effect to the language of the decree as it stands.

Our attention has been called to a judgment of another

is Court where a similar question to the present one was
 1 by the other appellant who had preferred a separate appeal
 at the same decree, and who obtained a similar order for his
 incurred in the lower Court. We have examined that
 ent, and if we had found that the Court on that occasion
 pronounced a positive opinion upon the true construction of
 words now in dispute, it would have had our most respectful
 on, but on examining the decision it is clear that the whole
 is left at large. It is true that the order of the lower Court
 on that occasion in execution of the decree was reversed,
 though reversed the Court pronounced no opinion upon
 construction of those words, but directed the parties to act
 might be advised.

must allow this appeal, but, under the circumstances of the
 and having regard to the fact that the judgment of the
 Bench which has been brought to our notice may have
 extent influenced the action of the respondent, we shall
 be appeal without costs. Each party here and in the
 below will bear his own costs. If the appellant has paid
 respondent the costs which have been awarded against him
 lower Court in this matter, he will be entitled to receive
 same from the respondent.

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[PRIVY COUNCIL.]

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March 12.

SETH GOKULDASS GOPULDASS . . . PLAINTIFF

AND

MURLI AND ZALIM DEFENDANT

Mistake of Law—Interest on Decree where Decree is silent—Suit for Damages upon a Decree—Separate Suit—Order for Attachment and Sale Notification—Act VIII of 1859, section 249—Suit for Foreclosure Reforming a Deed—Mistake—Foreclosure Decree.

It is a mistake (of law) to suppose that execution can be in interest on an amount decreed, from the date of the decree date of realization, no such interest having been awarded decree; and an agreement entered into which is based on that tion will not be set aside merely on that ground.

Madoosoodun Lall vs. Bheekaree Singh, 5 W. R., 109, *M. Pillai vs. Pillai*, L. R., 2 Ind. App., 219, cited.

A decree for the payment of a fixed sum of money therein binds the judgment-debtor to pay that sum immediately; and does not do so, the judgment-creditor may have an action on the decree for damages, such damages to be computed as in the decree of interest, from the date of the decree till date of payment amount of the decree remaining unpaid.

In *Pillai vs. Pillai*, L. R., 2 Ind. App., 228, their Lordships of the Privy Council, in reference to the question of levying interest on a decree where the decree was silent as to future interest, stated that questions of that nature might be raised by a separate suit.

On the application of a decree-holder, an order was passed that the rights and interests of the judgment-debtor in a village should be attached and sold in execution to satisfy Rs. 13,498-9-9. The sale notification, issued in pursuance of the order, stated that the amount to be satisfied was Rs. 16,498-9-9. After the issue of the notification, an arrangement was entered into under which the sale was stayed, and the judgment-debtor executed a deed of conditional sale, to secure payment of Rs. 16,498-9-9. *Held*, in a suit for foreclosure, that there was no authority under section 249 of Act VIII of 1859 for increasing the amount for which the village was ordered to be sold from Rs. 13,498-9-9 to 16,498-9-9, and that the deed ought, on the ground of mistake, in the absence of explanation, to be reformed by disallowing the additional sum of Rs. 3,000.

Form of a decree in foreclosure stated.

THE facts of this case are sufficiently set forth in the judgment of their Lordships of the Privy Council (1) which is as follows :—

This is an appeal from a decree of the Judicial Commissioner of the Central Provinces of India, in a suit instituted by the plaintiff against the respondents in the Court of the Deputy Commissioner of Jubbulpore, for the foreclosure of a mortgage.

The following are the circumstances under which the mortgage was executed :—On the 27th of June 1859, the appellant obtained a decree in the Court of the Sudder Ameen of Jubbulpore against Tarapat Patel, Malguzar of Khairi, the father of the defendants, for the sum of 9,413 rupees 15 annas and 3 pie, being the balance of principal and interest due upon a bond executed by Tarapat and the costs of suit. The decree was silent as to payment of future interest on the amount decreed. By the terms upon which the decree was obtained, it was expressly stipulated that interest should be paid at the rate of one per cent. per month.

Between the date of the decree and the 27th of June 1863, the plaintiff endeavoured on several occasions to obtain payment of the amount decreed, and did in fact realize portions of the amount under two several executions. It is unnecessary to enter into any details of the proceedings adopted by the plaintiff, or of the litigation which ensued upon them. It is sufficient to state in their Lordships' opinion no laches can be imputed to the plaintiff in endeavouring to enforce the decree.

In February 1865, the plaintiff applied to the Court of the Deputy Commissioner of Jubbulpore, against the defendants and their father, Tarapat, for an attachment and sale of their property in the village of Khairi, in execution for the sum of Rs. 9,413-9-9 claimed to be due under the decree.

The sum included interest on the amount of the decree calculated up to the 14th of October 1863, after giving credit for payments made on account. Upon that application the defendants and their father were ordered to be summoned, and upon their

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non-appearance an order was made on the 25th of July 1865 the attachment of their proprietary rights in the village, at the sale thereof by public auction, after due notice, according to sections 248 and 249 of Act VIII of 1859.

On the 3rd of August, in the same year, orders were issued the requisite notifications, according to section 249, be it and that the sale of the right and interest of defendants in village of Khairi should take place on the fortieth day from date.

On the 4th, the present defendants presented a petition to Deputy Commissioner, praying to be relieved from liability the plaintiff's claim, and that the attachment might be removed from the village. Upon that petition an order was made refusing to alter the order already made, and stating that, as defendants had failed to appear on the date appointed for hearing the case had been disposed of in their absence, the reason why they had absented themselves not having been explained. That order they appealed to the Commissioner, and their appeal was rejected.

On the 18th of September the mortgage upon which the case was brought was executed. It was by conditional sale, as set out at p. 40 of the Record, and is in the following words:

"Seth Khusalchand and Gokuldass, of Jubbulpore, plaintiffs Tarapat, (2) Murlidhar, (3) Zalim Singh, patels, residents of the village Khairi, Pergunnah Patan, defendants.

"Claim.

"Execution of Decree for Rs. 13,498-9-9.

"We Tarapat, Murlidhar, and Zalim Singh, patels and residents of Mouzah Khairi, defendants, are the writers of this agreement.

"The plaintiffs above-named having taken out execution of a decree for the sum above-mentioned, and applied for attachment and sale of village Khairi, the 13th September 1865 was first appointed as a date for the sale of the village in accordance with orders from the Deputy Commissioner. Subsequently the 18th of the said month had been fixed as a date for sale, in liquidation of a sum of Rs. 16,498-9-8.

"We have now brought the plaintiffs to terms, and having gone through the accounts, we agree to pay plaintiffs as principal, interest, costs, and interest on the decree, in all 19,000 Government sicca rupees.

"Of this we have caused 5,000 rupees to be paid by Narain Raghonath. This leaves a balance of 14,000 Government rupees.

to liquidate, paying no interest, by yearly instalments as detailed until the liquidation of the whole amount due, we hereby mort-
 conditionally sell the village in question, the condition being that
 of our failing to pay any one of the instalments agreed upon
 of the village shall become absolute; we and our heirs would then
 proprietary rights in the village, and such rights would be trans-
 plaintiffs, to be thenceforward enjoyed by them and their de-
 s. Should, however, the failure on our part to pay the instalments
 be attributable to unfavourable seasons, &c., the said instalments
 payable next year, and will bear interest at 1 per cent.

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Should the payment in arrears be not made in the next year, along
 due for that year, the sale of the village will be considered

The terms of this deed of sale would be binding on our heirs and
 lives also, and so long as the money due to plaintiffs remains un-
 village shall not be transferred by us to any one else; any such
 made, shall be held to be illegal.

relinquish all claims to any money which the plaintiffs may have
 at the time of the sale becoming absolute."

Details of the instalments were for the payment on the
 San-Sambat 1922, corresponding with the year 1865, of
 of 2,000 rupees, and on Jeth 15th in each of the follow-
 ing years, of the sum of 600 rupees, making a total of
 rupees.

On the same 18th of September 1865, Tarapat the father, each
 defendants, and the plaintiff, respectively, made the follow-
 ings, viz. :—

Tarapat, defendant, son of Mahadeo, caste Koormee, aged 50 years,
 resident of Khairi, states on solemn affirmation :—

"I have effected a settlement of his claim with the plaintiff by
 giving our village, and fixing instalments for the liquidation of the
 debt, that our village be released from attachment." 18th Septem-

Tarapat, defendant, son of Tarapat, caste Koormee, aged 28 years,
 Khairi, malguzar, states on solemn affirmation :—

"I have effected a settlement of his claim with the plaintiff by fixing
 for its liquidation, I beg that the village be released from attach-
 ment, and have hypothecated our village as a guarantee for the liquida-
 tion of the plaintiff's claim." 18th September 1865.

Tarapat, defendant, son of Tarapat, caste Koormee, aged 21 years,
 Khairi, malguzar, states on solemn affirmation :—

"I have fixed instalments for the payment of the plaintiff's claim, and

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beg that our village be released from attachment. We have mortgaged village to plaintiff.' 18th September 1865.

"Seth Khushalchand, son of Sawaram, aged 62 years, caste Mahest resident of Jubbul, and a mahajun by profession, states on solemn affirmation :—

"I have taken out execution of a decree against Tarapat, Murl, Zalim, and their village was about to be sold. The defendants have, however, made an amicable arrangement for the liquidation of my claim agreeing to pay instalments, which I have approved. I have no objection whatever, and I beg that the arrangements be sanctioned by the Court, the village released from attachment. The defendants have hypothecated the village, and I wish that it should remain so hypothecated, and the be struck off the file.' 18th September 1865."

The mortgage was on the same day presented by the defendants to the Extra Assistant Commissioner, who forwarded the case to the Court of the Deputy Commissioner, who thereupon, on 19th of September 1865, ordered that the kistbundi be sanctioned and the case struck off the file as completely disposed of.

The defendants continued to pay the instalments under the mortgage up to 15th Jeth 1929, but failed to pay the instalments which fell due in Sambat 1930 and 1931, whereupon the plaintiff, on the 24th of October 1874, filed his plaint and prayed for a decree for Rs. 7,800, the amount of the instalments remaining unpaid, with a proviso that, in the event of the instalments not being paid up within one year, the rights and interests of the defendants and their deceased father in the village in question be transferred to plaintiff, the transaction being then construed as one of an absolute sale.

The defendants in their written statement alleged, among other things, that in June 1849 a money decree for Rs. 9,413-15-3 was passed against Tarapat, their father, and that the future interest on the decree was not allowed; that the plaintiff, however, fraudulently went on executing the decree without interest, and eventually, in September 1865, induced Tarapat and the defendants to execute the deed sued on by dishonestly concealing the fact that future interest had not been decreed.

They also stated that they were ignorant people, and that they executed the deed under a mistake of fact, i.e., under the impression that future interest had been decreed as represented

plaintiff; that at the time when the deed was executed only Rs. 13,798-4-9 was due under the decree, and that the defendants were minors at the time of the execution of the deed.

A plea of minority was found against the defendants, but the District Commissioner dismissed the plaintiff's suit with costs, on the ground that the claim was based on an illegal contract.

It was held that even if the plaintiff had a right to demand the sum of Rs. 13,498-9-9, for which execution had been awarded, this was not sufficient explanation as to how that amount was arrived at. It was held that even if, as the District Commissioner had suggested, the plaintiff in making up the account with defendants, added interest for the period from 1863 to the day fixed for the sale of the village in execution, that alone was sufficient to vitiate the contract, for, in the opinion of the District Commissioner, it was evident that the plaintiff was well aware that he had no real claim to interest. But he further held that the plaintiff was not entitled to any amount on the decree; that Rs. 4,820 only were due; and that the plaintiff by concealment of facts regarding the amount due, and by misrepresentation of facts as shown by the proceedings in the original case, and the application for execution for Rs. 13,498, were sufficient grounds for setting aside the transactions out of which the contract grew. The contract was held to be unlawful.

On appeal, the Commissioner was of opinion that there was no direct evidence of concealment, but that there was misstatement with regard to defendant's liability to interest. It was held that the meaning of Definition 1, section 18 of the Indian Contract Act No. IX of 1872. He further held that the bond was nothing more than a kistbundi; that no new consideration was given; that if the parties had arranged that effect should be given to it by the executing Court, it would have been valid, as it altered the terms of the decree by the addition of interest, which could not be done even with consent of the parties. He therefore held that the contract was illegal under clause 2, section 23 of the Indian Contract Act, and dismissed the appeal with costs.

A civil appeal was preferred to the Judicial Commissioner,

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who dismissed it with costs, on the ground that the decree was voidable under section 20 of the Indian Contract Act, inasmuch as both parties were under a mistake of fact essential to the agreement expressed in it. Their Lordships are of opinion that there was no sufficient evidence to prove a fraudulent presentation or concealment of facts on the part of the plaintiffs. There was, no doubt, a mistake of law on the part of the defendants in supposing that execution could be issued for interest upon the amount decreed from the date of the decree to the date of realization, no such interest having been awarded by the decree. But that mistake appears to have been common to the plaintiff and the defendants, but also to the District Commissioner by whom the order of the 25th of July 1878 was made for the attachment and sale of the village in execution for the sum of Rs. 13,498-9-9. Indeed, until the Full Bench ruling of the High Court of Bengal in September 1886, in the case of *Madosoodum Law vs. Bhukaree Singh*, reported in the "Weekly Reporter," Miscellaneous Decisions, p. 109, the principle of which was upheld by the Judicial Committee in the case of *Pillai vs. Pillai* (2 Law Reports, Indian Appeals), there were conflicting rulings upon the point whether interest upon a decree could be levied in execution when the decree was silent as to subsequent interest on the amount decreed.

In that uncertain state of the law, the defendants, having appeared to show cause, an order was in fact made for the attachment and sale of the village in execution for the sum of Rs. 13,498-9-9, which included interest on the principal. No appeal was preferred against that order, nor were any proceedings adopted to set it aside. It remained in force at the time of the mortgage, and the village had been actually attached and was liable to be sold under it if the compromise had not been effected and the mortgage executed. Their Lordships are of opinion that the mortgage was not invalid either upon the grounds stated by the Commissioner, or upon that stated by the Judicial Commissioner. It appears to have been executed in full way of compromise, after an examination of the accounts, in which the father, Tarapat, was present; and it does not appear to their Lordships that, subject to what will hereafter be said,

of Rs. 3,000 part of the money secured, the plaintiff any unconscionable advantage by the transaction; for he was not strictly entitled to an execution for interest for a period subsequent to the date of the decree, and to be no reason why he should not have recovered his damages in an action upon the decree if he and the court which issued the attachment had not mistaken his remedy. It is necessary to refer to the English decisions bearing upon the right of recovering by action interest upon a judgment which cannot be levied by execution. In the case of *Pillai vs.*

Law Reports, Indian Appeals, p. 228, to which reference has been made, the Judicial Committee, in reference to the question of levying interest upon a decree where the decree was for future interest, stated expressly that questions of this kind might be raised by separate suit.

It is to be remarked that the rate at which interest was calculated during the period between the execution of the mortgage and the times of the payment of the instalments was extremely low.

It is, however, to be assumed that the sum for which the village was liable to be sold in execution was not Rs. 13,498-9-8, but Rs. 16,498-9-8.

The sum capital in the mortgage is "Subsequently, the 18th of the month had been fixed as the date for sale in liquidation of Rs. 16,498-9-8." As to this the Judicial Committee says: "In the first Court's judgment, the larger sum of Rs. 16,498-9-9 is referred to as entered in one of the orders of execution, viz., 'the Notice of Sale,' but the record of proceedings nowhere mentions such a sum. If no sum was ever entered in such a process, it must apparently have been only through a clerical error." Although there does not appear to have been any wilful misrepresentation in this matter on the part of the plaintiff, their Lordships are of opinion that there is no authority under section 249 of Act VIII of 1859 for increasing the amount for which the village was ordered to be sold in execution from Rs. 13,498 to Rs. 16,498; that the error has not been satisfactorily explained; and that the deed should be reformed by disallowing the additional sum of Rs. 3,000. This will reduce the sum secured by the mortgage by

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Rs. 3,000 and a proportionate part of the sum allowed future interest during the period stipulated for payment by instalments, which may be taken in round numbers as together amounting to Rs. 3,480. Deducting Rs. 3,480, and the eight instalments of the Rs. 14,000 which have been paid, amounting Rs. 6,200, from the total amount of Rs. 14,000 secured, there remains the sum of Rs. 4,320 to be paid by the defendants to plaintiff in order to redeem the above-mentioned village.

Their Lordships will, therefore, humbly advise Her Majesty that the decrees of the three lower Courts be reversed; that in the event of the defendants paying to the plaintiff the sum of Rs. 4,320, together with the costs of the plaintiff in the lower Courts, within one year from the time of the giving upon them of notice of such order of Her Majesty in Council, shall be made in this appeal, or in the event of their paying to the Court of the Deputy Commissioner of Jubbulpore within the period the said sum of Rs. 4,320, together with such costs aforesaid for the use of the plaintiff, the said village shall be freed and discharged from the said mortgage; but that in the event of the said sum of Rs. 4,320, together with such costs aforesaid, not being paid to the plaintiff by the defendants, or paid by them into the said Court for the use of the plaintiff, within the period aforesaid, the said mortgage and conditional sale shall become absolute, and all the right, title, and interest in the said village shall be transferred and vested in the plaintiff; and in order that due notice of such order in Council shall be given to the defendants, their Lordships will further advise Her Majesty that the plaintiff be ordered to lodge the said decree of Her Majesty in Council in the Court of the Deputy Commissioner of Jubbulpore, in order that notice thereof may be given to the defendants in due course, and that the plaintiff do also deposit in the said Court such an amount as may be required to defray the costs of serving upon the defendants notice of the said order.

Considering the peculiar circumstances of this case, and the fact that the plaintiff has not succeeded to the full extent of his claim, their Lordships are of opinion that the respondents ought not to be ordered to pay the costs of this appeal.

[CIVIL REFERENCE.]

ABOR ALI AND ANOTHER DEFENDANTS;
AND
DDAI BEHARI PLAINTIFF.

1878
March 6.

Execution of joint decree by one of the decree-holders—Money had and received—Limitation Act, IX of 1871, sch. II, cl. 60.

A decree obtained by A and B was transferred by B to C without the knowledge of A. C executed the decree; and A subsequently sued C for his share of the proceeds: *Held*, that A had no cause of action against C, but against B, and that the suit should have been dismissed. *Held*, further, that if A would have any cause of action against C, it would be for money had and received to A's use; and the suit would be governed, as to limitation, by Act IX of 1871, sch. II, cl. 60.

REFERENCE from the Deputy Commissioner of Manbhoom, on appeal from the Judge of the Small Cause Court at Rughu-nipore.

The claim is thus stated:—“The *pro formâ* defendant Bungshi hari sold a decree, obtained by the father of himself and of the plaintiff, to the defendant without the knowledge of the plaintiff. The defendant took out execution on this decree, and realized money. Plaintiff sued for a portion of this money, and it was held that his cause of action arose on, and time began to run against him from the 25th of July 1873. On the 27th of April 1877, or after three years from this date, the plaintiff put in his claim. The question is, is the claim which has not been put in within three years from the 25th July 1873 barred by time? The appellant maintains that it is, and quotes Article 60 of Act IX of 1871 (Limitation Act.)”

The judgment of the High Court (1) on the reference submitted was delivered by

JACKSON, J. :—

JACKSON, J.

We think this is a very clear case. If the plaintiff had any cause of action at all against the defendant, he clearly had it

(1) JACKSON and CUNNINGHAM, J.J.

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 WIBON ALI (plaintiff's) use, and if that be so, the suit would have to
 v. brought within three years under Article 60 of the Limita
 GADDAI Act. But there was another very good ground apparently
 BEHARI. which the plaintiff's suit might be dismissed, which was, that
 Judgment. the cause of action was not against the defendant purchaser at
 JACKSON, J. but against his own co-sharer who had wrongfully sold
 property. We think that this suit ought to have been dismiss
 The defendant will have the costs of this reference.

[CIVIL REFERENCE.]

March 30. RAMA KANT NANDI AND ANOTHER . . . PLAINTIFFS
 AND
 SHIBA NANDA RAI . . . DEFENDANT

Pleader's Fees—Special Agreement with Client.

An application was made for leave to sue defendant in *forma pauperis* and he agreed with certain vakueels to give them full fees according to valuation of the claim, in case they should succeed in having the application rejected: *Held*, that this was a valid agreement, and that the vakueels having performed their part, were entitled to recover upon it.

REFERENCE under section 617 of the Code of Civil Procedure of 1877, from the Judge of the Small Cause Court at Dacca.

The case is thus stated: "Plaintiffs, who are pleaders practising in the Court of the District Judge of Dacca, sue defendant under the following circumstances:—A certain person applied for leave to sue defendant in *forma pauperis* in respect of a claim; defendant engaged the services of plaintiffs in opposition to the application. With respect to their fees the plaintiffs made the following proposal to the defendant. The proposal was in writing, and is in these words:—"We want full fees according to the valuation of the claim, in case we succeed in having the plaintiff's prayer to sue as a pauper rejected." The defendant denies having accepted the proposal, and says there was no contract between him and the plaintiffs regarding the

fees to be paid, but I find on the evidence that he did accept the proposal; I also find that the present plaintiffs rendered professional services to the defendant and were paid Rs. 34 on that account. The application for leave to sue in *forma pauperis* being rejected, plaintiffs now sue for the remainder of fees due under the special agreement. The question now is the above agreement enforceable at law? I am of opinion it is not; for it seems to be opposed to public policy."

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RAI.
Statement.

The judgment of the High Court (1) on the reference submitted follows:—

There is no reason why the pleaders should not recover the amount of fees agreed on. The agreement seems to be that whether the application for leave to sue in *forma pauperis* succeeded or not they were to get the full fees ordinarily payable in a suit of this description for conducting it throughout for the defendant, though it might so happen that permission to institute the suit might not be granted.

[CIVIL REFERENCE.]

LASH CHUNDER DASS LARAK . . . PLAINTIFF; April 4.

AND

KANTA NATH CHUNDRA AND OTHERS . DEFENDANTS.

*Suit of Money by Instalments—Stipulation on Default—Limitation—
Act XV of 1877, schedule II, clause 75.*

Defendants verbally agreed to liquidate a debt by payment of monthly instalments extending over a period of two years; and it was stipulated that, on default of payment of any three successive instalments, the whole sum remaining unpaid should become due and payable. Defendants neglected to pay three instalments in succession, and no suit was brought within three years of the date of the third default: *Held*, that the stipulation did not bind the creditor to sue, but gave him an option of doing so; and that the whole claim was not barred.

Act XV of 1877, schedule II, clause 75, does not apply to verbal contracts.

(1) MARKBY and PRINSEP, J.J.

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Statement.

REFERENCE under section 617 of the Code of Civil Procedure of 1877, from the Judge of the Small Cause Court Bishenpore.

The case is thus stated :—“The plaintiff alleges that, in execution of a decree, the defendants in this case adjusted the debt and verbally contracted to pay Rs. 68 by instalments Rs. 3 per mensem from Pous 1280 to Aughran 1281, and Rs. 2 per mensem from Pous 1281 to Choitro 1282; and that on default of payment of three successive instalments, whole amount should become due. The defendants did not pay any of the instalments; hence that portion which has been so far was relinquished, and the present suit to recover the sum for the instalments from Pous 1281 to Choitro 1282, being Rs. 12, was instituted on the 13th December 1877. The defendants contend that under the contract, as alleged by the plaintiff, the sum became due on default of payment of the three successive instalments from Pous to Falgoon 1280; that the plaintiff has no cause of action to recover the whole sum accrued in Choitro 1282, and that as this suit has been brought after the expiration of three years from the said date, the claim is barred, as the provisions of art. 75, second Schedule of Act XV of 1877 are not applicable to a suit for money due under an oral contract. The plaintiff replied contended that that article is general and equally applicable to oral contracts. Both parties applied to refer the matter under section 617 of the Civil Procedure Code, Act X of 1877, for the decision of the following point by the Honourable Court. The point referred for decision is :—Whether the provisions of clause 75 of the second schedule of Act XV of 1877 are applicable to oral contracts, or to written instruments.

The decision of the High Court (1) on the reference submitted is as follows :—

Answering simply the question put to us, we think we are bound to say that art. 75, sch. II, of the Indian Limitation Act of 1877 does not apply, according to its strict terms, to a suit brought on a verbal contract. But it appears to us that the question really arises in the present suit, because we think the plaintiff

(1) JACKSON and CUNNINGHAM, J.J.

bound, but only had the option to avail himself of the clause obliging him to sue at once for the whole amount due on the day to pay the particular instalments, and in point of fact the day did not otherwise become due except on the falling due or fulfilment of the date of the successive instalments. The plaintiff got his costs.

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[ORIGINAL CIVIL JURISDICTION.]

J. L. FLEMING & CO. PLAINTIFFS;
AND
J. L. FLEMING & CO. DEFENDANT.

April 10.

Mercantile Contract—Construction of Contract—Condition Precedent—Shipping Order.

On the 16th of February 1877, A contracted with B for the shipment of a cargo of 1,300 tons of wheat to London by a ship of B's at sea. The shipment was to take place on notice in May or June, "after completion of two country voyages." *Held*, that, on a construction of the whole contract, the latter clause must be taken as a condition precedent; and the ship not having completed two country voyages, within the meaning of the stipulation, A was entitled to refuse to carry out his part of the contract.

A party who has entered into a written contract is *prima facie* entitled to have a literal construction put upon that contract; and the fact that adoption of a literal construction would enable him to get rid of a claim which he has found to be disadvantageous is no reason for rejecting it.

The proper mode of construing a mercantile contract is first to ascertain the meaning and legal effect of the document as it stands, and then to apply the facts of the surrounding circumstances which ordinarily it would be the province of a jury to find.

See *vs. Burness*, 3 B. and S., 751; and *Bowes vs. Shand*, 2 App. Cas., 455, cited and followed.

In this case the plaintiffs, as Agents for the Charterers of the ship "Hooper," granted on the 16th of February 1877, to the defendant, who carries on business as a Merchant in Calcutta,

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under the style and firm of Graf and Banziger, a shipping order which the following is a copy :

CALCUTTA, 16th February, 1877

"Hooper," S.S. to arrive.

After completion of two country voy
 London.

Graf and Banziger.

1,310 tons Oilseeds or Wheat.

£3-12-6 Oilseeds.

20 cwt.

£3-10-0 Wheat.

On notice in May or June.

First notice to be given for this cargo.

NICOL FLEMING & CO

On the arrival of the "Hooper" in Calcutta on the 31 March, she was despatched by the plaintiffs to False Madras and Colombo, and she returned to Calcutta on the 1st of May 1877. On that day the plaintiffs wrote to the defendants the following letter:—"We shall feel much obliged if you will place your placing alongside the S. S. 'Hooper' cargo as noted, in terms of the shipping order, dated 16th February 1877, for 1,000 tons wheat and (or) oilseeds."

In answer to this letter the defendants wrote on the 2nd of March as follows:—"We beg to return your notice of shipment. The shipping order provides that notice is to be given after completion of two country voyages. Now the 'Hooper' has made only one country voyage. Your notice is premature. We cannot therefore accept it."

A long correspondence ensued between the parties which resulted to no result, and the plaintiffs re-let the space in the ship to the defendant, and presented their bill to him for Rs. 5,800, the difference between the amount of freight at the contract rate and the rate at which the freight was re-let. This sum the defendant refused to pay, and plaintiffs brought the present action to recover it from him.

The plaintiffs' case was, that under the terms of the shipping order the defendant was bound to ship, on notice being given to that effect, in May or June, and without reference to the completion of two country voyages and whether or not the "Hooper" had performed two country voyages. That the clause as to the two country

inserted by them to enable them to send the "Hooper" on such voyages, if they so wished, before loading her for London, and that it was merely a descriptive clause to indicate what time the steamer would be ready, and not a condition. At the defendant's object in entering into the contract was to ship in May or June, and not specially after the vessel had made two country voyages. That it could not possibly be very material to defendant that two country voyages should be first made; that if a second voyage had been made, and the steamer loaded for London at the end of June, the defendant would have been in a worse position, as freights were lower at that date than in May when the notice was given. Besides, the "Hooper" took on this one trip double the time which steamers usually take to perform a country voyage.

The defendant's case was that the plaintiffs were not entitled to call upon him to ship until the vessel should have performed two country voyages, and that she had only performed one country voyage. He also claimed that he was entitled to first ship under the terms of the shipping order, and that he did not get it. The issue settled were as follows:—(1) What are the terms, if any? (2) Did the "Hooper" make two country voyages at the time notice was given, within the meaning of the shipping order? (3) Were the plaintiffs entitled to require the defendant to ship under the said shipping order without performing two country voyages?

Phillips, (Evans with him,) opened the case for the plaintiff.

Tranmer and Bonnerjee, for the defendants, cited *Tully vs. Howell*, 2 Q. B. D., 183; *Stanton vs. Richardson*, 9 C. P., 390; *Cranston vs. Marshall*, 5 Exch., 395; *Tarrabochia vs. Illickie*, 1 H. & C., 183; *Oliver vs. Fielden*, 4 Exch., 135.

Evans, in reply, cited *Behn vs. Burness*, 3 B. & S., 751; *Smith vs. Gye*, 1 Q. B. D., 183.

The judgment of the Court was delivered by

WILKES, J.:—

PONTIFEX, J.

I know of no prior case between a ship-owner and a charterer, in which the litigation has arisen in consequence of the ship being

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ready to receive cargo too soon. Generally the case is the way; the ship is late, and the charterer complains that adventure is thereby prejudiced. I can find, therefore, no ex authority governing this case. But, as between consignor consignees, two cases have occurred of a too early shipment one being the case of *Bowes vs. Shand*, 2 App. Cas., 455; the other the case of *Alexander vs. Vanderzee*, quoted in first case. These cases, however, do not seem to me to the present case, though many of the expressions of opinion the Judges in *Bowes vs. Shand* are extremely apposite. It is that the proper way to construe this contract, or the shipping order, which is the evidence of the contract, is first to examine with judicial criticism as opposed to the common-sense perspective from which a jury would regard it, and afterwards to submit to such examination the facts of the surrounding circumstances which it would be the province of a jury to find. In *Burness*, 3 B. & S., 751, WILLIAMS, J., in delivering the judgment the Court says: "It was no part of the Judge's duty to lay before the jury any question as to the construction of the contract, the materiality of any of its statements. It was his function to construe the contract with the aid of the surrounding circumstances found by the jury, and to decide for himself whether the statement that the ship was in the port, supposing it to be true, was an essential part of the contract or a mere representation, and to direct the jury to find for the defendant or plaintiff accordingly."

In the first place, therefore, I proceed to a critical examination of the press copy shipping order. I think we are not at liberty to impute to what I may call the mercantile mind the intention to use in their documents useless or empty words. The fault in mercantile documents generally lies in the opposite direction. They are usually too concise for easy interpretation, and fail on the side of omission rather than on the side of surplusage.

I must, therefore, assume that the words "after the completion of two country voyages," appearing in the shipping order, were inserted therein for the benefit of one or for the benefit of both of the parties, but not for the benefit of neither. Not seeing, first of all, if the words are of any benefit to the plaintiff,

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Justice WILLIAMS continues: "Then, if the statement of the of the ship is a substantive part of the contract, it seems that we ought to hold it to be a condition, upon the point above explained, unless we can find in the contract itself surrounding circumstances reason for thinking that the did not so intend. If it was a condition and not perform follows that the obligation of the charterer dependent terminated at his option, and considerations either of the damage to him or of proximity of performance on the part of the owner are irrelevant." And there are other considerations besides the time of the departure of the ship from Calcutta, as it concerned the having the wheat in readiness for the considerations which apply to the consignees in London. here I may refer to the observations of the Lord Chancellor in *Bovess vs. Shand*: "My Lords, if that is the natural meaning of the words, it does not appear to me to be a question for the Lordships, or for any Court, to consider whether that contract which bears upon the face of it some reason, some intention, why it was made in that form, and why the stipulation was made that the shipment should be during these six months. It is a mercantile contract, and merchants are in the habit of placing upon their contracts stipulations which they do not attach some value and importance, and that might be a sufficient answer. But, if necessary, an answer is obtained from two other considerations: It is obvious that merchants making contracts for the purchase of rice—contracts which oblige them to pay in a certain time for the rice purchased, and to be ready with the funds for that payment—may well be desirous, both that the rice should be forthcoming to them not later than a certain time, and that the rice shall not be forthcoming to them at a time later than it suits them to be ready with funds for its payment. In the same way here it might be convenient for the defendant to have some indication of the time when it would be required of them to send funds up-country to buy their wheat; and, however, that they had purchased their wheat already. The Lord Chancellor goes on to say: "Therefore, it may be that a merchant, making a number of rice contracts

all months of the year, will be desirous of expressing
 rice shall come forward at such times, and at such
 of time, as it will be convenient for him to make the
 and it may well be that a merchant will consider that
 attained that end if he provides for the shipment of the
 g a particular month, or during particular months, and
 will know that, provided he has made that stipulation,
 will not be forthcoming at a time when it will be incon-
 venient for him to provide the money for the payment.”
 it may be that it was incumbent on the defendants in
 to acquaint their consignees in England, as definitely
 as, with the time when their wheat would arrive in
 and not to leave the time of arrival as indefinite as, but
 in view of this clause, the date of despatch would have
 been a time corresponding in indefiniteness to the period
 between the 1st of May and the 30th of June. The questions
 of transit and of go-down stowage in Calcutta would
 be of material considerations. I am of opinion that the inser-
 tion of these words in the contract would have enabled the
 plaintiffs to discover approximately at about what time the
 ship would be in Calcutta ready for loading. It is immaterial
 whether the country voyages might be, whether they were long
 or short, or whether all events the shipment was to commence not earlier

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the ship had made one short voyage, and had then started
 on a second voyage, long or short, the defendants would have
 been able to discover, from the Custom House entries and
 to what port the ship would be sent on her second
 voyage, so to discover approximately when she would be likely
 to arrive for the purpose of taking cargo for London. This
 was the defendants' letter of the 12th of May 1877.
 It was quite immaterial to the defendants that the
 ship made a second country voyage so far as her fitness
 for service was concerned. But it might have been vastly material to them
 to know the time which would be occupied by even
 a second country voyage to get their wheat ready for shipment,
 especially as the ship was a vessel of the largest tonnage, and
 within the bounds of reasonable probability that it

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 NICOL FLEM- which, with loading, unloading, and probably re-loading
 ING & Co. inloading, must necessarily have occupied a substantial per
 v. time.
 KROGLEB

Judgment. I arrive, therefore, at the conclusion from a criticism
 PORTER, J. of the shipping order, that the clause was inserted for the
 of the defendants, and of the defendants alone. And
 come to consider the evidence and the surrounding circum-
 stances that opinion is strongly confirmed.

On the one side there is the evidence of the plaintiffs' and
 the broker who obtained the shipping order. On the other
 that of Mr. Kreig. Mr. Kreig has stated distinctly that, when
 shipping order was first brought to him, it did not contain
 words "after the completion of two country voyages," and
 on talking it over with the broker, the latter took back the
 draft and obtained the insertion of these words. Looking at
 press copy of the order, I find that the words are written in
 different ink, and therefore I come to the conclusion that
 were written at a different time from the rest of the document.
 The broker, however, says that when he first brought the ship-
 ping order to Kreig, these words were in it.

I am bound to say that the broker's memory appears
 most indistinct, and his evidence most unprecise; and I am
 obliged to accept Mr. Kreig's evidence in preference to
 of the broker. It also appears to me, from the very evidence
 of the broker, that he was confused in his recollection and mis-
 taken. For there was another shipping order brought by him to the
 plaintiffs to the defendants on the same day for 400 tons of
 cargo in the same ship. The broker says that he believed
 this second shipping order did not contain the words in question
 when he took it to Kreig, but that at Kreig's request he took
 back to Nicol Fleming and Co., and obtained the insertion of
 these words in the second document. I think he was mistaken
 in the two shipping orders, and this is almost proved to de-
 cision on comparing the press copies of those documents. The
 first has the words in different ink, as I have already said;
 the second these words do not appear at all. I conclude, there-
 fore, on the evidence, that these words were considered

as material words, were inserted at their instance, and intended by them to form a substantive portion of the contract and are therefore a substantial element of the contract, and the plaintiffs could not sue on this shipping order, at all without showing that they had allowed to the defendants time for shipment as would be the reasonable equivalent of a country voyage.

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said that the defendants, by the first of their two letters of the 4th of May, absolutely refused to carry out their contract. The shipping order here read the defendants' reply set out in the report of the case, *ante*.] I do not find in the correspondence an absolute refusal. Nor did it appear at the time to have been understood by the plaintiffs or their advisers, for on the 4th of May they again called upon the defendant to

On the 30th of April the plaintiffs write, not that the ship "is not going on a second voyage, but that they will not send her," so it was then still probable that she was to go on a second voyage. The defendants, on the 1st of May, say that there must be some mistake, as their shipping order was for a ship after two country voyages. The plaintiffs on the 2nd of May write again, not that there is to be no second voyage, but that there is not much chance of it, so that all this time the plaintiffs are kept in complete uncertainty as to whether the plaintiffs are to ship in a few days or whether their cargo may be required until the end of June. On the 8th of May the plaintiffs first give definite notice, requiring the defendants to "have the cargo ready for shipment on our giving you notice on her arrival which arrival they then expected would be in two or three days. On the 9th of May they call upon the defendants to ship the cargo alongside, that is to say, writing to the defendants to a cargo of wheat which could not be expected to arrive in Calcutta, they call upon them to be ready to ship

On the 10th of May the plaintiffs write to say, "We hereby give you notice to ship the cargo of the above ship." Then, on the 11th of May, the plaintiffs' Solicitors write, "We are instructed by Messrs. Nicol, Fleming and Co., to call on you at once to ship the 1,300 tons, &c." Now, the

1878
 NICOL FLEM- first notice was on the 8th of May, when the "Hooper" was
 ING & Co. "expected" to arrive, and on the 11th they insist on imm-
 v. shipment, or they will proceed in default to re-let tonnage.
 KEOGLE. the 14th of May the plaintiffs' solicitors wrote: "You
 Judgment. informed long before the steamer arrived here that she
 PONTIFEX, J. proceed direct to London." In that statement the soli-
 were acting upon incorrect information. It was quite pro-
 up to the 8th of May, that the plaintiffs would send the "per"
 per" on a second country voyage. Some observation has
 made on the use of the words "at once" in this letter. I
 said that all that was required was that the defendants
intimate at once whether they would ship or not. This
 in my opinion the true construction to be put on that letter
 refers expressly to the previous letter of the 11th of
 which does not ask for an immediate intimation of intention
 calls for immediate shipment. I think, therefore, that
 if the plaintiffs were at liberty, by giving reasonable notice
 do away with the necessity of a second country voyage, they
 wholly failed to show that they have given such notice.

A matter of prejudice has been raised, which is usually
 in this class of cases, namely, that the defendants have been
 to get out of the contract because rates were going down
 that they took advantage of these words as a mere subterfuge.
 This may be so, or it may not; but if it is so, it is, in my opinion,
 wholly immaterial. I refer to the judgment of Lord Esher,
 Lxx, in *Bowes vs. Shand*:—"If the words have a certain
 meaning, it is dangerous to depart from that meaning. If
 you can arrive at any sound ground upon which you are
 so, it is dangerous to depart from it upon a conjecture.
 can make no difference to the parties, and especially you
 reject the literal construction because you think that, and
 reject it, you may be affording an opportunity for a
 purchaser to escape from his bargain. Of course, as I
 already observed, in many cases a purchaser is desirous of
 ing from his bargain, and if he finds that the bargain
 attempted to be enforced as against him is not only binding
 upon him but is against the letter of his contract, there is
 nothing in our law which prevents his availing himself of it."

r to the case made against him, viz., that he has not entered
 he engagement you allege, and if you seek to fasten upon
 re engagement, you must first bring him within the four
 s of the contract."

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ink also that this farther observation may be made upon
 t of freights having gone down. The defendants may

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you glad in consequence of freight having gone down to
 d from their bargain, but if freights had not gone down,
 t probable that the plaintiffs would have sent the ship on
 d country voyage? And in that contingency they would
 scarcely consulted the defendant's convenience in the

I am of opinion that the plaintiffs fail in this suit, and
 must be dismissed with costs.

[CRIMINAL REVISIONAL JURISDICTION.]

THE MATTER OF GANGADHUR BHONYA AND OTHERS
 (CONVICTS.)

April 16.

*XXII of 1869 (Stamp Act) section 43—Trial by the officer authorised
 to institute and conduct the prosecution.*

Here an officer has been authorised by the Collector under section 43,
 XVIII of 1869, to institute and conduct the prosecution in certain
 he is not competent also to try them.

See vs. Nuddya Chand Poddar, 21 W. R., Cr., 1, followed.

referred by the Sessions Judge of Midnapore that certain
 s of fine passed by the Magistrate of the Division of
 under section 29, Act XVIII of 1869, might be set
 contrary to law.

Here that, on enquiries made, certain breaches of the stamp
 private traders were brought to light. The Collector of
 ore, under section 43 of the Stamp Act (XVIII of 1869)
 ed the officer in charge of the Division of Contai to
 and conduct the prosecution in these cases, and that
 Magistrate, tried and convicted the accused, sentencing
 fine under section 29 of that Act.

1878
 GANGADHUR
 BRONJA
 Statement.

These orders were referred to the High Court as a Court of Session by the Sessions Judge of Midnapore, who considered the proceedings held by the Magistrate were contrary to the Sessions Judge cited *Queen vs. Nuddya Chand Poddar*, W. R., 1, Cr. B.

The judgment of the High Court (1) on the reference submitted is as follows :—

These cases have been submitted to us by the Sessions Judge Midnapore, because sentences of fine have been imposed by Magistrate of the Division of Contai for breaches of the Law, contrary to the rule laid down in the case reported in W. R., 1. It appears that the Collector authorized this officer section 43 of the Stamp Act to "institute and conduct the prosecution" in these cases. Under these circumstances we think that he was not competent also to try them. Any inconvenience might have been obviated by the Collector engaging the Government pleader or some other person to conduct prosecution under section 43. We quash the convictions and sentences, and direct that the fines if paid be refunded.

(1) MARKBY and PRINSEP, J.J.

[CRIMINAL APPELLATE JURISDICTION.]

MOONATH DUTT. APPELLANT.

1878
April 18.

sec. 191, Indian Penal Code—False evidence—Witness criminating himself—Evidence Act, I of 1872, sec. 132.

Although a person under examination as a witness is bound by his affirmation to tell the truth, if he is examined on a point on which he is likely to incriminate himself, his position should be explained to him by the Magistrate, as otherwise he may be induced, through ignorance of the law, to deny the existence of facts for fear of penal consequences. Although without such a warning he may make a false denial and thereby become guilty of the offence of intentionally giving false evidence, his offence will not be deserving of severe punishment.

CRIMINAL APPEAL from the orders of the Sessions Judge at Bangalore, convicting the appellant of intentionally giving false evidence in a judicial proceeding (section 193, Indian Penal Code) and of abetting a public servant to receive an illegal gratuity, such offence not being committed in consequence of that offence (sections 116 and 161), and sentencing him separately for each offence.

Brojo Mohun Dutt, the Naib of a Zemindar, was under examination before the Magistrate of Contai on a charge of causing wrongful confinement. While that case was under trial, the Inspector of Tumlook reported to the Police Inspector of that district that he had learnt that, for some reason unknown to him, an attempt was being made by Juddoonath Dutt to induce the medical officer by means of a bribe to certify that on a certain day Brojo Mohun Dutt was under his medical treatment. In consequence of this being made known to the Magistrate, who directed the attendance of Juddoonath Dutt, and examined him as a witness in the trial of Brojo Mohun Dutt, when he denied the act imputed to him by the Police of attempting to procure a false *alibi* by the medical officer. Proceedings were then taken against Juddoonath Dutt, which resulted in his being convicted and sentenced by the Sessions Court as already stated.

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JADDOONATH
DUTT

Judgment.

MARKBY, J.

Mr. R. E. Twidale, for the Appellant.

The judgment of the High Court (1) was delivered by

MARKBY, J. :—

With regard to the false evidence, although we cannot go far as to say that the Magistrate who sent for the prisoner put the questions to him had no authority to do so, it was the duty of the Magistrate, if he intended to examine the prisoner as a witness in the other case, to explain his position to and to inform him of the protection which the law gives viz., that he himself would not suffer any consequences if he told the truth. Unless the Magistrate did that, the prisoner cannot reasonably presume that he was in reality undergoing some proceedings against himself which might lead to his being convicted of an offence. Therefore, without saying absolutely that the offence was committed, we have no hesitation in saying that the sentence passed was very much too severe.

But this in no way affects the charge upon which the prisoner has been convicted under sections 116 and 161; and, considering that the sentence of six months' rigorous imprisonment and one hundred rupees which has been passed for this offence is the maximum punishment which the law has assigned for it, we think that if we allow that sentence to stand and pass no sentence upon the other charge, the prisoner will be sufficiently punished for the substantial offence which he has committed.

(1) MARKBY and PRINSEP, J.J.

[CIVIL APPELLATE JURISDICTION.]

MDRA KISHORE SINGH . . . DECREE-HOLDER ;

1878
January 18.

AND

B PERSHAD SEN . . . JUDGMENT-DEBTOR.

*of Decree—Payment into Court of amount of Decree—Objection
of Judgment-debtor—Interest.*

judgment-debtor who wants to be released from the claim of his creditor must pay the money covered by the decree into Court to the satisfaction of the decree-holder unconditionally. If he chooses to make a protest, the creditor is not bound to take the money out subject to any protest which may arise as the consequence of such protest.

A got a decree against B for a sum of money, the balance of an account. B deposited the amount of the decree in Court, objecting to Rs. 9,000, part of that sum, should not be paid out to A, on the ground that he had appealed as to three items of the account which covered that amount. The lower Court paid no attention to the objection, but did not formally disallow it, and A declined to take the Rs. 9,000. B's appeal having been dismissed, A applied for the Rs. 9,000 and got it. He then applied for interest thereon during the time it had been deposited in Court: *Held*, that he was entitled to it; it was owing to B's act that A had been deprived of the money for the period for which he claimed interest.

CIVIL APPEAL from an order passed by the Subordinate Judge of Sarun.

Sree Nath Banerjee, for Appellant.

M. E. Mendies, for Respondent.

Facts of the case are sufficiently set forth in the marginal note in the judgment of the High Court(1), which is as follows:—

The appellant had a decree against the respondent. The respondent, having deposited the amount of the decree in Court, refused to pay out a portion of it, namely, Rs. 9,000 and odd, being Rs. 9,000 and odd, on the ground that he had an appeal pending in respect of three items of the account as stated. The Subordinate Judge,

(1) AINSLIE and McDONNELL, J.J.

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 RAJENDRA
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 Judgment.

in his judgment now before us, says, "but that objection of was not allowed," from which the inference is that the objection was disallowed. In fact there was no judicial order at all. Court does not seem to have troubled itself to consider the objection of the respondent or to have made any order in the matter. Then the Subordinate Judge goes on saying that, because the decree-holder having this objection staring him in the face did not choose to withdraw the money which had been paid to the Court under protest, he must be taken to have left it lying there owing to his own fault, and that he therefore had no right to his interest upon it. It appears to us that the Subordinate Judge has not only incorrectly stated the facts of the first process but has gone entirely wrong in his view of the rights of the parties. It is quite clear that a judgment-debtor who wants to be released from the claim of his creditor must pay the amount covered by the decree into Court to the credit of the decree-holder unconditionally. If he chooses to make a protest, the creditor is not bound to take out the money subject to any liability which may arise as the consequence of such protest. The course adopted by the decree-holder in this case seems to us to be perfectly natural. Having this protest of the judgment-debtor in view, and of Rs. 9,000, he declined to take the money until his rights had been finally decided. The result was, that owing to the fault of the debtor he remained without his money for a certain period for which he claims interest; and we think that he is entitled to it.

It is argued for the respondent that the order on the application by the judgment-creditors must be taken to mean that the amount due under the decree was fully satisfied. No doubt this is so; but at the same time we think it is evident that the money was owing to an oversight; and that the creditor had a right to come in promptly, as he did, and ask to have the account reopened. Nothing had been done by the debtor as a consequence of the mis-statement of the account tendered by the creditor at the first instance, nor was there anything like an agreement that the account should stand as stated by the decree-holder.

It is said that it must be taken that the order of the Court in recording that the decree had been fully satisfied was made

ance of both parties and with their consent. It does not
 or that this was so. As far as we are informed it appears
 the Court did not take the trouble to have an account drawn
 signed by the parties. Had there been an accepted
 at, there might have been a difficulty in re-opening the
 ; but as matters stand, we think that it was quite open
 decree-holder to say that he had omitted one of the items
 under his decree and that he now claims it. We reverse the
 of the lower Court, and allow the interest claimed to be
 from the date of deposit to date of payment of the
 100, with costs of this appeal and of the Court below.

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RAJENDRA
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 v.
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 PERSHAD SEN.

Judgment.

[CIVIL APPELLATE JURISDICTION.]

BUNDHOO SINGH JUDGMENT-DEBTOR ; February 18.

AND

AGHTEN DECREE-HOLDER.

*Petition of Decree—Appointment of Manager—Act VIII of 1859,
 section 243.*

Where a judgment-debtor asks that a manager be appointed under
 VIII of 1859, section 243, he must show that the circumstances
 such that the order for which he applies would be a reasonable and
 or one. He should not only show what is the income of the par-
 property and the amount due under the decree, but he should
 show whether that income is unincumbered, and if incumbered, to
 extent. He cannot ask the Court to make an order under this
 with respect to one single property before disclosing the whole
 of his affairs, the extent of his liabilities, and the means he has
 meeting them.

FLAR APPEAL from an order passed by the Subor-
 dinate Judge of Tirhoot.

In case the property of the debtor which was advertised
 was held in lease by the decree-holder. The judgment-
 petitioned for a manager to be appointed, and that the
 of the decree be paid off in yearly instalments from out
 annua payable to the debtor. The amount of this *jumma*

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v.
MACNAGHTEN. was disputed, and the Court refused to make the order.
judgment-debtor appealed to the High Court.
Baboo *Nogendro Nath Roy*, for Appellant.
Collis, for Respondent.

Judgment.

The judgment of the High Court (1) was delivered by

AINSLIE, J. AINSLIE, J.:—

This is a regular appeal against an order of the Judge of the Court below refusing to appoint a manager of certain property under section 243 of Act VIII of 1859. Certain facts have been alleged by the judgment-debtor, and there are counter-assertions by the judgment-creditor. It appears to us that the judgment-debtor has altogether failed to show that the circumstances are such that the order he asks for would be a reasonable and proper one. He has not attempted in the first place to certify that there are no other claims or encumbrances attached to the property. It is necessary in a case of this kind not only to show what is the income of the particular property which is the subject of attachment and the amount due under the mortgage, but to go on and show whether that income is unincumbered, or if incumbered, to what extent. The debtor cannot properly ask the Court to make an order under section 243 with respect to one single property before disclosing the whole state of his affairs, the extent of his liabilities, and the means he has for meeting them. It is then for the Court to judge whether or not an order can be made under this section. This has not been done. The Court made an order under section 243 without knowing whether there were other incumbrances which may render it useless. It would be a mere waste of time.

Further, the pleader for the appellant has altogether failed to satisfy us that there is any material on the record from which we can conclude that even in respect of the particular property named by the judgment-debtor there would be clear income of Rs. 3,443 available to meet this particular debt. The application of the judgment-debtor must therefore fail. The appeal is dismissed with costs.

(1) AINSLIE and McDONNELL, J.

[CIVIL APPELLATE JURISDICTION.]

**KH KHORSHED HOSSEIN AND
MRS** } DECREE-HOLDERS ;

1878.
February 27.

AND

EE FATIMA AND OTHERS . . . JUDGMENT-DEBTORS.

for Partition—Execution at instance of Judgment-debtor—Limitation.

Where a decree for partition has been obtained by one co-sharer against another, it is a joint declaration of the rights of the parties interested in the property, and must be taken to be in favour of the defendant as well as the plaintiff. The decree may, therefore, be executed at the instance of the defendant.

The proceedings taken by the plaintiff in execution of such a decree are proceedings taken on account of both plaintiff and defendant, and they are continued at the instance of the defendant, notwithstanding that the plaintiff wishes to have the execution case struck off the file.

Where defendant applies to have the execution of a decree for partition set aside, more than three years after the passing of the decree, the application will not be barred by limitation if made within three years of a previous application for execution made by the plaintiff.

CIVIL APPEAL from an order passed by the Judge of Tirunelveli affirming that of the First Subordinate Judge of that District. The case is thus stated in the judgment of the District Judge :—
The appellants, Khorsheed Hossein and others obtained a decree, on the 10th June 1871, for the partition of 3 annas 6 gundas share, out of Mouzah Dilawarpore, *alias* Malpore, lakhraj. They applied for execution in the Subordinate Judge's Court, and in due course the greater part of the butwara proceedings were completed ; and succeeding in their endeavours to have everything their own way, especially in the allotment to their *puttees* of one particular share, and having failed in appeal to get redress, they applied to have the execution proceedings struck off the file—an application which the Subordinate Judge refused to accede to, as the judgment-debtors were willing to bear the expenses attending completion of the butwara, which was accordingly ordered to proceed. The decree-holders now appealed against this order, contending that the judgment-debtors cannot be allowed to carry on the proceedings, they themselves not being disposed to do so.

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so, and judgment-debtors having no status as decree-holders. In-
 ing in mind the rules laid down in Regulation XIX of 18
 think the lower Court was quite right in directing the bu-
 to proceed at the instance of the judgment-debtors." *de-*
cre decree-holders appealed specially to the High Court.

Moonshee *Muhammed Yusuf*, for Appellant.

Mr. *M. L. Sandel*, for Respondent.

The judgment of the High Court (1) is as follows :—

It is contended in this case that the defendant is not entitled to execute the decree at all; and, if entitled, that she is barred by limitation. With regard to the first point we are of opinion that a decree for partition is not like a decree for money or the delivery of specific property, which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of the persons interested in the property of which partition is made, and having been so made it is not necessary for those persons who are defendants in the suit to come forward and institute a new suit to have the same rights declared and a second decree made. It must be taken that a decree in such a suit is, when properly drawn up, a decree in favour of each shareholder or of the shareholders having a distinct share. In the present instance there being fortunately only two parties, there was no real ambiguity in the drawing up of the decree.

On the question of limitation we think that it is impossible in a case like this to hold that the execution proceedings taken by either one shareholder or the other are anything but proceedings on account of both the shareholders. The necessary result of those proceedings was to divide off the share of the defendant, and while this was going on at the instance of the plaintiff it would have been merely superfluous for the defendant to put in an application to have the same thing done at her instance. Therefore we think that it must be taken that the proceedings for execution earlier than 1876 have the same effect as if they had been originated in the name of the defendant. Consequently the limitation does not apply. The appeal is dismissed with costs.

(1) AINSLIE and McDONELL, J.J.

[CIVIL APPELLATE JURISDICTION.]

MOORAREE SINGH . . . ONE OF THE JUDGMENT-DEBTORS ; 1878
February 23.
AND
YAG SINGH. DECREE-HOLDER.

Case of Decree against heirs of the Debtor—Heirs substituted as parties in the suit—Property of Deceased Debtor—Issues—Section 203, Act II of 1859.

Where the defendant in a suit for the payment of money died before decree, his sons were made parties, and a decree for the debt due by the deceased was given against them. In execution of this decree the decree-holder attached certain property in the hands of one of the sons, who objected on the ground that it was his self-acquired property : Held, that the proper issues to be determined were : (1) Whether the property attached by the decree-holder had formed a part of the estate of the deceased debtor ; and, if not, (2) whether, if it is separate property of the son, that son has misapplied any property received by him from his father, and, if so, to what extent.

CIVIL APPEAL from an order passed by the Judge of the District Court reversing that of the Subordinate Judge of that District. The judgment of the Subordinate Judge in this case is as follows :—“The original suit was brought against Ramdhun Singh, who died during the pendency of the case. Mooraree Singh and three others, sons of the deceased, were made defendants in the suit. Mooraree Singh, judgment-debtor, contends that the mouzah, which has been attached in execution of this decree, was purchased by himself ; that he has not inherited any property from his father ; that he was separate in property and income from him ; and that his property cannot be sold in satisfaction of his father's debt. The judgment-creditor asserts that the property is the heritage of Ramdhun Singh. The judgment-debtor in support of his allegations has filed, amongst other documents, a copy of a sale certificate, dated the 25th of May 1876, which shows that the attached property was sold on the 27th of May 1871, and purchased by the judgment-debtor. The property was purchased in the name of the judgment-debtor, and he

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is in possession thereof. The judgment-creditor has not any reliable evidence to show that the property was purchased by Ramdhun. In this country properties are purchased in the name of the sons, and *benamsee* transactions prevail. But should not be justified in basing our judgment on mere speculation and conjecture. The judgment-creditor cannot succeed unless he can prove that the deceased paid the consideration and was the real and beneficial purchaser, nor can he put up property for sale unless he succeeds in establishing his allegation that the judgment-debtor succeeded to his father's property. If it be admitted that the property was joint and undivided, so much as it was acquired when the family was joint, the property cannot be sold unless it is made out that the debt contracted by Ramdhun for the benefit of the family or the property." On appeal the Judge reversed this decision on the ground that, as the decree was passed against Mooraree and his brothers, every portion of their property was liable to be sold in satisfaction of it. The judgment-debtor appealed to the High Court.

Baboo Jadoo Nath Sahas, for Appellant.

Baboo Mohesh Chunder Chowdhry, for Respondent.

The judgment of the High Court(1) is as follows :—

The facts of this case are sufficiently set out in the judgment of the Subordinate Judge. The Subordinate Judge held that the judgment-creditor is bound to show that the property which he wished to sell on account of his decree was acquired by the deceased Ramdhun Singh, and that it came into the hands of the judgment-debtor by inheritance from the father. He expressed his opinion that the judgment-creditor had failed in making this case. He further held that, if it be admitted that the property was joint and undivided, it could not be sold unless it was made out that the debt was acquired by Ramdhun for the benefit of the family. It appears to us that in this last view the Subordinate Judge was not right. If the sons intended to place the debt did not create a charge upon the estate which de-

(1) AINSLIE and McDONELL, J.J.

their father, Ramdhun, they were bound to do so when they arties to the original case. It must now be taken that the se by Ramdhun was a charge upon his property which the ure bound to pay.

ppeal, the lower Appellate Court reversed the decision of Court, holding that the decree was given against the sons, at all their property was liable in satisfaction of that decree; therefore, immaterial whether the property attached was aired property or not. This is not a correct view of all been done in the present case. It appears to have been the original suit that there was some property of the which descended to his sons, and which was, therefore, ble with his debts; but, as we are informed, there was no tion of such property. Before the judgment-creditor eed against any specific property, he must show either that property belonging to the father, which passed from him sons, or that some property of the father which descended ns, has been made away with by them in an improper o as to make their own self-acquired property liable in ion for the property obtained by inheritance.

ection 203, Act VIII of 1859, the representative of a person is only liable under a decree for money made him as such representative to the extent of the property ceased which has come to his hands. Before his per- ate can be charged at all it must be shown that he has property out of the estate of the deceased. This being lies on him to account for its proper application; and so fails to account he is personally liable to the defendant. ge has not gone into the question of what was the extent roperty received by the sons from the father, or what ne of it. We, therefore, think it is necessary that the d be sent down to him for re-consideration on its

Lordships of the Judicial Committee, in the case reported R., 185, (also 11 B. L. R., 149: *Chowdhry Wahid Ali mat Jumae*), after pointing out that a party in a repre- character is so distinctly a party to the suit, that under nditions his own private property may be attached and

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sold, say "It is true that to fix him with this liability it be shown that he has received property of the deceased of he has failed to prove a proper disposition ; but those thin all cognizable and proper to be ascertained in the suit in the decree is made during the progress of the execution pr ings founded upon such decree." This appears to have overlooked by the Judge in the Court below.

We remand the case to the District Judge to deter first, whether the property which the judgment-creditor he attached was a part of the estate of the deceased ; if there is no further question in the case, if not, then, whether, if it is separate property of the son, it has been that he has misapplied the property received by him from father, so as to make himself personally liable to compensate creditor in full or in part out of his own separate estate leave it to the discretion of the Court below to take evidence in the case. Costs of this appeal to abide the result.

[PRIVY COUNCIL.]

SHO SING RAI DEFENDANT ;

AND

MUSSAMUT DAKHO & MOORARI LALL . PLAINTIFFS.

1878
April 13.

Hindoo Widow—Adoption—Self-acquired property—Declaratory decree—Act VIII of 1859, section 15.

The sonless widow of a Saraogi Agarwala Jain takes an absolute interest in the self-acquired property of her husband ; she may adopt a son without having had her husband's authority or the permission of his heirs ; a daughter's son may be adopted, and on adoption takes the place of a begotten son.

Act VIII of 1859, section 15, relating to Declaratory Decrees, ought to receive the same construction as section 50 of the English Act, 15 and 16 Vict., c. 86, has received from the English Courts.

Kathama Natchiar vs. Dorasinga Tever, L. R., 2 In. Ap. 169, followed.

REAL from the High Court of Judicature for the North-western Provinces, Allahabad.

Wise and Raikes, for Appellant.

Wise, Q. C., Cowell, and Howard, for Respondents.

The facts of the case are sufficiently set forth in the following judgment of their Lordships (1) which was delivered by

MONTAGUE E. SMITH :—

This is an appeal from a judgment of the High Court of the North-west Provinces, which substantially affirmed a decree of an subordinate Judge of Meerut.

The suit was originally brought by the respondent, Mussamut Dakho, the sonless widow of Ishq Lall, in her own name ; Moorari Lall, her daughter's son, whom she had adopted, being afterwards added as co-plaintiff. The defendant (the appellant) was a younger brother of Ishq Lall. The family were Saraogi Agarwalas, one of the divisions of the sect of Jains, whose laws and

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customs, with regard to a widow's estate and her power of alienation, differ, as the respondents allege, from the ordinary customs which Hindoos are governed. This difference gives rise to principal questions to be decided in the present suit. The appellant died in 1867. He left considerable property, including Government notes, to the value of upwards of five lakhs of rupees. His widow took out the certificate of administration of his estate and obtained possession of it. It is admitted that the adoption by the Mussamut of her grandson was made without any consideration expressly derived from her deceased husband, and without the consent of his kindred—an adoption, therefore, which is not valid on its ground, as well as by reason of the relationship of the parties, would be invalid by ordinary Hindu law.

The immediate occasion of the suit arose in the following manner:—Ishq Lall, who had been an army contractor, employed by the Government, as a reward for services rendered during the Mutiny, a grant for his life of the zemindari of Nabballi, in Pergunnah Baghpat, an estate to which Government had acquired title by forfeiture. After his death the Government offered to sell the mouzah to his widow, and she purchased it for the price of Rs. 6,206. It has been assumed that the purchase money was paid out of the proceeds of her deceased husband's estate. It appears that, whilst making up the Wajilulur document called by the Subordinate Judge "the village settlement paper") the Settlement Officer called upon the widow to name her successor to the mouzah, with a view to entering the name in this paper; and that in answer to this requisition, she named that the name of Moorari Lall should be recorded as her son and successor. The appellant objected to this being done, and the Settlement Officer thereupon ordered the following entry to be made in the Wajilulur:—

"Para. IX.—Regarding special tribes and customs of adoption, marriage, or succession.

"Mussamut Dakho desired that Moorari Lall, her daughter, who she adopted, should succeed her after her death. But Sheo Sing, her younger brother of her husband, on hearing this, objected that it was not that an adoption should take place without the permission of the near relations. The Settlement Officer, therefore, passed the following order on the 15th July 1871:—'The parties may get this point decided

Court, and all points of this paragraph shall be decided by order of Civil Court."

Both the Courts in India have stated that the Settlement Officer, calling upon the Mussamut to name her successor, acted in excess of his powers. It has not been shown what is the precise act of the Wajibulurz, nor what are the regulations or orders under which it is made. The reference to "paragraph IX, regarding special tribes and customs of adoption, second marriage, succession," seems to indicate that, when these special customs are found to exist, it is desired that they should be recorded for information of the settlement authorities. The Settlement Officer directed that the order he had made for the above entry should be communicated to the Mussamut by the Tehsildar, and she should be advised to have the question of adoption settled by the Civil Court.

The present suit was thereupon brought; and, in consequence of an objection which has been taken to its maintenance, as being a declaratory suit only, it will be necessary to advert to the proceedings in it. The plaintiff (the widow being sole plaintiff) states, in a general and somewhat informal manner, her claim to be maintained in possession "by establishment of plaintiff's exclusive right of inheritance to the estate of her husband, comprised of the mouzah above described, and to uphold the adoption of Moorari Lall, plaintiff's daughter's son, as well as his right personally to succeed her after her death, by voiding the defendant's transactions, under the usages and customs of the Saraogi religion." It then alleges that the defendant, during the progress of the late settlement, raised the objection that the widow cannot, without the consent of the relations of the family, make an adoption; and that the plaintiff was referred to the Court by the Settlement Department.

The defendant, in his written statement, after objecting to the entry on the grounds that the adopted son was not made a party to the entry in the Wajibulurz did not give a cause of action, but that the suit was unnecessary and premature, stated his case on the merits as follows:—

Sd.—The law of inheritance applicable to the Jains is nothing different from the Shastras. They are all subject to the common Hindu law.

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Therefore, both according to law and custom, the adoption of a d son is invalid; moreover the custom of adoption is not universal nized among the people of this sect.

"4th. Among the Jains, a widow is not competent of herself a son, unless with the permission of her husband or the consent of heirs.

"5th. The plaintiff, as heiress of her husband, possesses only interest. Her right is not permanent, and she has no power to the property. The defendant, the brother of the deceased, is, a Shastras as well as a verbal declaration of Ishq Lall, the owner sessor of the whole of his estate. The plaintiff only possesses a the property by way of maintenance for her life. She will hold it as she lives, and then the defendant will be entitled to it sioner."

Evidence having been taken respecting the customs an of the Saraogi Agarwala Jains, the Subordinate Judge, specifically deciding upon these customs, dismissed the the ground that the plaintiff, by adopting a son who, up tion, would become, if his adoption were valid, heir to h "had raised a barrier" to her own claim of absolute rig on appeal to the High Court, the Judges were of opi the Subordinate Judge had not sufficiently inquired ascertained the special customs of the Jains, and th wrong in dismissing the suit. The Court, therefore, the suit under section 351, Civil Procedure Code, and that an opportunity should be given for making the ad a party to the suit. The following passage of the judg tains the view of the Court with regard to the nature of the inquiry to be made by the Subordinate Judge:—

"We are invited by the pleaders of the parties in this Co directions to the Court below on the questions of Jain law raised in this suit.

"The Jains have no written law of inheritance. Their subject can be ascertained only by investigating the customs wh among them; and for the ascertainment of those customs w Court below would exercise a wise discretion if it issued Com the examination of the leading members of the Jain commu places in which they are said to be numerous and respectable, Muttra and Benares. The questions to be addressed to these would be the following:—

"What interest does the widow take under Jain law in the m

able property of her deceased husband? And does her interest differ
 set of the self-acquired property and the ancestral property of her
 1? Is a widow under Jain law entitled to adopt a son without
 received authority from her husband, and without the consent of
 band's brother? May a widow adopt the son of her daughter?
 adoption of a son does the adopted son succeed as the heir of the
 as the heir of her deceased husband?

the adoption of a son by a widow any effect, and (if any) what
 limiting the interest which she takes in her husband's estate?
 The Subordinate Judge considers that the verbal gift which the
 alleges is established by proof, he might further inquire
 such a gift is valid as against the widow?"

the suit being thus remanded, Moorari Lall, the adopted
 made a co-plaintiff, the Mussamut being appointed his

missions to take evidence as to the customs of the Saraogi
 Jains were then issued to Delhi, Jeypore, Muthra,
 ares, and several leading members of that division of
 community were examined under them at each of
 places. The Subordinate Judge has thus summarised their

the exception of one from Delhi, the others unanimously declare
 in absence of any son, a Jain widow succeeds to the estate of her
 moveable and immoveable, in absolute right. 2nd.—That she can
 at pleasure and without restriction. 3rd.—That she can adopt
 her's son, without requiring any consent or authority from her
 husband, or relatives of such deceased husband; and that such
 son would succeed to her deceased husband's estate in the same
 her own begotten son would have done, with a slight restriction.
 a nuncupative will by her husband would not be valid as against
 this last point does not at all bear on the case, seeing that there
 was no such will having been pronounced."

Subordinate Judge then made a decree in favour of the
 in the following terms:—

The plaintiff is entitled to a decree to be maintained in possession
 indari property in question, on the ground of her exclusive and
 right thereto as heir of her husband, and for a declaration of the
 the adoption made by her, and of the right of her adopted
 by her daughter, there being nothing to prevent his succession
 as."

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The defendant again appealed to the High Court, one ground of appeal being that the witnesses, except at Jeypore, had not been examined on oath. Another ground was, the finding of the Subordinate Judge as to there being no evidence regarding the nuncupative will by the deceased husband of the plaintiff in favour of the appellant was incorrect."

On this appeal coming on to be heard, the Judges of the High Court held that the evidence objected to had been lawfully taken, and being of opinion that it would not be necessary to decide the important questions of Jain law involved in the case upon the evidence of the Jeypore witnesses alone, they determined, before finally disposing of the appeal, to send fresh Commissions from their own Court to Delhi, Mutha, and Benares. These Commissions were accordingly issued, and on them the original and new witnesses were examined, and their testimony was given at greater length than on the first trial. Upon the return of these Commissions, the cause was again heard by the High Court, and the judgment now under appeal pronounced. It contains the following general account of the history and religious tenets of the Jains :—

"The parties are Saranogi Agarwalas, one of the numerous sub-sects of the sect of the Jains. What little is known of the history of the sect is to be found collected in the learned judgment of the Chief Justice of Bombay in *Bhugwan Dass Tejmal vs. Rajmail*, 10 Bombay H. C. 10. For upwards of eleven and twelve centuries they have seceded from the creed of the Vedas, and their religious tenets have more affinity with the precepts of the Buddhists than with those of the Brahmins. They recognise the caste system of the Brahminical Hindoos, and in such matters as they retain, generally avail themselves of the assistance of a Brahmin."

"They differ particularly from the Brahminical Hindoos in their conduct towards the dead, omitting all obsequies after the corpse is cremated or buried. They also regard the birth of a son as having no effect on the future state of his progenitor, and consequently, adopt a merely temporal arrangement and has no spiritual object."

The Judges then proceed to an elaborate review of the various religious systems in India in which the laws and customs of the Jains have been considered. It appears to have been contended before the Court to use the words of the Court, "that the applicability of the laws of the Brahminical Hindoos, or what is

med Hindoo law, had been established by so many rulings the Court was bound to apply it to this case," and further, no uniform and consistent body of customs and usages had among the Jains which would enable the Court to affirm the general law was modified by them. It certainly appears in most of the decisions referred to by the Judges, the Courts had held that there was no sufficient proof of the existence of special customs among the Jains to displace or modify the general law, though in others, where sufficient proof of special customs appeared, effect had been given to them. Their view of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the Jains might be governed, as to some matters, by special laws and usages, and that where these were satisfactorily proved, effect ought to be given to them. The learned Counsel for the appellant, who argued the case at their Lordships' Bar, felt himself unable to dispute the correctness of this conclusion.

It would certainly have been remarkable if it had appeared in India, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed of customs and usages differing from the ordinary law, whether for the Hindu or Mahomedan, the Courts had denied to the large wealthy communities existing among the Jains, the privilege of being governed by their own peculiar laws and customs, where those laws and customs were, by sufficient evidence, capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise. It is doubtful whether it appears from the judgment of the High Court of Bombay, delivered by WATSON, Chief Justice, in *Bhugwan Das vs. Rajmal*, 10 Bombay H. C. R., 241, that the Judges of that Court were not satisfied that in the Presidency of Bombay, usages had been established to exist among the Jains at variance with ordinary Hindoo law. "Hitherto," they say, "so far as we can discover, none but ordinary Hindoo law has been administered either in this Island, or in this Presidency to the Jains of the Jains sect." This view was expressed by the Judges after considering and commenting upon several extracts from historical and text writers. They also remark upon the

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impolicy of introducing departures from the general law Lordships, however, do not understand the Judges to customs having such an effect may not lawfully be given to, if established by sufficient evidence. On the contrary judgment contains this passage :—

“ But when amongst Hindoos (and Jains are Hindoo dissenters) custom different from the normal Hindoo law of the country, in property is located and the parties resident, is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence.”

Reference was also made to the observations of the Judges respecting the proof required to establish customs in the case of *Ramalakshmi Ammal vs. Sivanantha Perumal*, 14 Moore 585. The facts in the case before the High Court of Madras were, that after the death of both husband and wife, the property of the deceased husband, with the consent of the Pundit, a nephew of the husband to be his son by adoption. Evidence given in support of such a custom of adoption was not sufficient and the Court held that it was not sufficiently proved. It is said in the judgment, “ not a single Yati, or Pandit, or other expert, either in the lore of the Jains or of the Hindus has been called to prove the alleged custom.” Upon such a custom being, as the Judges point out, opposed to the normal of the Hindoo law of adoption, would require strong evidence for its support, and such evidence appears to have been wanting in that case.

In the present case their Lordships consider that the decision of the High Court were right in thinking that the property should be governed by the evidence taken in this case. The evidence, particularly that taken at Delhi, is entitled to great weight, having regard both to the status of the witnesses and to the consistent manner in which they describe the custom. It is stated in the judgment below that “ Delhi is the headquarters of the Jains in the north-west of India, and is the nearest district to that in which the property is situate.” The witnesses in which the witnesses were called together to be examined their position in the Jain community, and thus described in the judgment:—

Commissioner reports that, on receipt of the Court's commission, and upon the Deputy Commissioner to furnish him with a list of names principal members of the Jain community residing in Delhi; that 26 persons whose names were so furnished, he selected 26 persons, summoned to attend his Court, and that of the 26 he examined whom two, Zora Mul and Ghyan Chund, were elders of the Council met at Delhi, appointed to determine all questions of religious and importance arising in the sect, while the other four persons selected a rank that entitled them to admission to the Lieutenant-Governor. Of these, also, one, Baldeo Singh, deposed he was a member of the Council before-mentioned. Furthermore, the Commissioner, in reliance of the appellant, took the evidence of two others out of the persons summoned. As all the witnesses so selected by the Commissioner must be presumed to have been impartial, and as either party is bound by the terms of the Commission to produce any witnesses who should be examined, and the appellant availed himself of this privilege only so far as to examine two of the witnesses summoned by the Commissioner, it is hardly going too far to say that no better parol evidence could be obtained than was taken under the Delhi Commis-

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Lordships are relieved from an examination of this evidence in detail, since the learned Counsel for the appellant has declined to admit that the conclusions drawn from it by the Court were in the main correct. These findings are thus confirmed by the judgment, and their Lordships entirely concur in

accepting this evidence with that given by the independent witnesses under the several Commissions, and having regard to the position of the Delhi witnesses hold as expounders of the law of the sect, it is not to be doubted that the weight of evidence greatly preponderates in favour of the respondents. It appears to us that, so far as usage in this community admits of proof, it has been established that a sonless widow, like Saraogi Agarwala takes, by the custom of the sect, a very much larger share in the management of the estate of her husband than is conceded by Hindoo law to widows of orthodox Hindoos; that she takes an absolute interest in the self-acquired property of her husband (and, as we have said, it is necessary for us to go further in this suit, for the property in suit was acquired by the widow out of self-acquired property of her husband); that she enjoys the right of adoption without the permission of her husband or the consent of his heirs: that a daughter's son may be adopted, and on adoption takes the place of a begotten son. It also appears proved by the parol evidence, that on adoption the estate taken by the widow

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passes to the son as proprietor, she retaining a right to the ga the adopted son and the management of the property during and also a right to receive during her life maintenance proportionate extent of the property and the social position of the family."

The Court adds :—

"We do not, however, desire to be understood as ruling this suit for the widow, and the adopted son has not been separately at the Bar, and we have not had the benefit of such assistance. Bar on this point as on the other issues, there being at present between the widow and the adopted son as to their respective rights. We shall affirm the decree of the Subordinate Judge, declaring the validity of adoption and the right of the adopted son to succeed to the estate in suit as a begotten son, but we shall vary the decree of the Subordinate Judge, so far as it declares the widow entitled to be retained in possession as proprietor, by inserting the alternative in favour of her adopted son."

Their Lordships will advert hereafter to the form of the decree. They will now proceed to consider the objections to the decree on the ground that it is merely declaratory, and does not give relief. It is scarcely necessary to say that their Lordships do not intend to adhere to the opinion declared in several decisions of the Privy Council Board, that section 15 of the Indian Act VIII of 1850, relating to Declaratory Decrees, ought to receive the same construction as section 50 of the English Act, 15 and 16 Vic., c. 20, which, similarly worded, has received from the English Courts a different construction. In the last of these decisions the English and Indian Courts on the subject were reviewed, and it was laid down that a declaratory Decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been granted by the Court, or unless in certain cases a declaration is required as a step to relief in some other Court. (*Moothoo Natchiar and others vs. Dorasinga Tevar*, 11 B. 169.)

The question whether a right to some consequential relief exists must therefore arise in all suits in which a declaration of title is sought. It is enough for the present purpose to say that a right to come to the Court to have a declaration which obstructs the title or enjoyment of property

or for an injunction against such obstructions, would be to sustain a Declaratory Decree. It was contended on the respondents, that the intervention of the appellant proceedings of the Settlement Officer, and his objection to the Wajibulurz of the name of Moorari Lall as a son of the Mussamut on the ground that the adoption, was an act of obstruction against which they sought relief; and if it had been shown that the entry had been necessary to the settlement of the title, or the right to present the contention might have been well founded. But this was not shown. It would seem that the mouzah had been granted by the Government to the Mussamut, and she was recorded as proprietor. The object of the paper as already stated, to record peculiar customs and the information of the Settlement Officers; and, although the Deputy Collector asked for information as to the success of the adoption, and, upon the appellant's objection to the adoption, placed his objection upon the Wajibulurz, and the parties to a Civil Court, their Lordships would find it difficult, to say the least, if it had been necessary to decide upon this point, in coming to the conclusion that the proceedings were such an obstruction to the title or possession as would sustain the decree.

On the ground, on which it was alleged the plaintiffs were entitled to relief, was that the appellant had put forward a nuncupative will of his deceased brother, by which he was made the sole owner of the estate, and that the plaintiffs were entitled, if the will was valid, to a decree annulling that will. It would not be disputed that if a fictitious will in writing be set up, upon a proper case being made, might claim to have the will cancelled, and their Lordships are not prepared to say that in cases where property may legally pass by an oral nuncupative right to have it declared null may not exist. But such a will is not a bare assertion of title, but the result of a specific act by which title to property may be transferred. The reasons, too, for giving such relief in the case of nuncupative wills would seem to apply to nuncupative wills, and

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one of them, the probable deaths of witnesses, with eve force to the latter than the former. It was, however, e on behalf of the appellant, that relief against this wil one of the objects of the original suit, which was co the intervention of the appellant in the settlement pr Undoubtedly, the plaint refers only to this intervention assertion of this will appears for the first time in the de answer. But it will be found, on reference to the pr that the claim was persisted in after Moorari Lall had b as a co-plaintiff, and indeed to the end of the suit. (framed at the first hearing of the cause was, whether t will had been in fact made, and one of the questions witnesses examined upon the customs of the Jains was, a verbal gift is valid against the widow. The Comm which this question appeared were issued after the fi to the Subordinate Judge, and after Moorari Lall had t a co-plaintiff. In his judgment, given after the retur Commissions, the Subordinate Judge expressly fin issue that a nuncupative will by the deceased husband be valid as against the widow; and, although he add was no evidence that such will had been "pronon defendant, in one of his grounds of appeal to the H complains that this finding is not correct, and the E deals with the question of this will in its final judgment.

The contention, then, on the part of the appellan putting forward of this will ought not to be regarded, to the objection that it was not introduced into the plaint. It is, however, questionable whether, when M was made a plaintiff, the suit ought not to be co this purpose as a new suit, and whether the appella before that time put forward the claim in question and in it to the end, relief might not, if asked for, have be against it. It would not be necessary that the suit s been in fact re-modelled when Moorari Lall became as to ask for this relief, it is sufficient if it might be re-modelled, and relief obtained.

Their Lordships, however, do not think it necessa definitive judgment on this question, because they are

under the circumstances in which this appeal to Her Majesty comes on to be heard, the appellant ought to be prevented from insisting on his objection to the decree, on the ground of its being declaratory only. In his petition to the High Court for leave to appeal to Her Majesty, the appellant made no reference, in the grounds of appeal, to this objection to the decree. The leave granted by the High Court having become absolute in consequence of the deposit for costs not having been made due time, application to this Board for special leave to appeal was made. In the petition for this leave, again no reference was made to this objection, but the application was made on the ground that important questions affecting a large number of persons were involved in the decision sought to be appealed. This petition, after fully stating the conclusions of the High Court upon the evidence relating to Jain customs, contains the following passage:—"The petitioner now humbly submits that the suit is one concerning properties of large value, and involving questions of great importance to the sect of the Jain community, to which the petitioner belongs." Their Lordships on this ground, advised Her Majesty to grant special leave to appeal, they are invited, when the appeal comes on to be heard, to examine or consider the important questions thus raised, but to reverse the judgment on a ground which altogether precludes their discussion. Their Lordships do not by this intend to lay down, as a rule, that no questions can be raised at the hearing which are not indicated in the petition for special leave to appeal; but, in the present case, considering the course of the proceedings in the Court below, to which they have adverted, the importance of the questions upon which the appellant obtained special leave to appeal, and the somewhat unusual character of the objections raised to the maintenance of the suit, they think the appellant ought not, at this stage, to be allowed to insist that by reason of these objections the decree should be reversed.

The majority has been taken to that part of the decree of the High Court which varied the decree of the Subordinate Judge, and to that that the widow was entitled to be maintained in possession of the property, by substituting the declaration that the widow

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is entitled to retain possession of the estate, either as proprietor or as manager thereof on behalf of her adopted son, J Lall. The substituted declaration, being in the alternative, no doubt in one sense uncertain; but it is independent of other declarations which decide the rights of the parties between the plaintiffs on the one side, and the defendants on the other, and repel the defendant's pretensions. The Court could not properly make a binding declaration as between adoptive mother and the adopted son, both being plaintiffs, no doubt, on this account that the decree, whilst it asserts the right of the widow to present possession as against the defendant, is framed in a form which avoids prejudicing the rights of the plaintiffs *inter se*. In the result, their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court with costs.

[CIVIL APPELLATE JURISDICTION.]

RAHUT HOSSEIN, PETITIONER;

February 25. SHEO GHOLAM SAHU DECREE-DEBT.

AND

KHUB LALL JUDGMENT.

Security for Performance of Decree—Deposit—Execution barred by Limitation—Act VIII of 1859, section 338—Limitation.

B appealed from an order passed in execution of a decree of Court A against B. The Appellate Court granted a stay of execution on security being furnished. Thereupon C on behalf of B deposited money and ornaments which were accepted as sufficient security. The appeal was dismissed, but no further proceedings in execution were taken, and the decree became barred by limitation. After the decree was barred, C applied for the return of the money and ornaments, and his application was rejected. *Held*, on appeal, that the application was rightly rejected, as the money and ornaments must, under the circumstances, be taken to have been held by the Court on behalf of the judgment-creditor.

SPECIAL APPEAL from an order passed by the Court of Session at Sarun, reversing that of the Moonsiff of that district.

In this case Gholam Sahu having obtained a decree against B, Khub Lall applied for execution. The judgment-debtor

Appellate Court ordered a stay of execution on security furnished. Thereupon the petitioner, Rahut Hossein, deposited security, on behalf of Khub Lall, Rs. 118-8 in cash amounts to the value of Rs. 176-13, on the 7th of March. The appeal was dismissed, but no further proceedings in the case seem to have been taken, and the decree became barred by limitation. In 1876 the petitioner Rahut Hossein applied for payment out to him of the money and the delivery of the property deposited, on the ground that the decree had become barred by limitation. The lower Court dismissed the application, but this was reversed on appeal by the District Judge. The decree-holder then brought this special appeal.

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Abinash Chunder Banerjee, for Appellant.
Mahomed Yusuf, for Respondent.

Judgment of the Court (1) was delivered by

J. :—

AINSLIE, J.

Gholam Sahu obtained a decree against Khub Lall which was sought to be executed. The judgment-creditor objected that the decree was barred by limitation. On the Court overruling this objection they appealed and obtained from the Appellate Court a stay order on the condition of their depositing security. In lieu of security, a certain sum of money and some jewels were deposited in Court by Rahut Hossein. The appeal was eventually dismissed and the stay order, therefore, came to an end.

The money and property was sufficient for the satisfaction of the decree, it was not necessary for any further proceedings to be taken in execution. So far as the money is concerned, when the appeal was dismissed, it must be taken to have been transferred to the credit of the decree-holder, and the Court should deal with the jewels pledged, converting them into cash for the benefit of the decree-holder. The District Judge reversed the order of the first Court on the ground that the decree was barred by limitation, but I am of opinion that no question of limitation arises. The decree should be decreed with costs and the order of the Court of first instance restored.

(1) AINSLIE and McDONELL, J.J.

[CIVIL APPELLATE JURISDICTION.]

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continued

DABEE MISSER AND OTHERS DEFEND

AND

MUNGUR MEAH PLAINT

*Suit for Possession—Trespasser—Denial of Tenancy in former a
Disclaimer.*

A sued B for arrears of rent. B denied that he was A whereupon A withdrew the suit and brought one for ejectment ground that he was the owner of the land, and that B, by his tenancy, had lost all claim to be treated otherwise than trespasser. It having been proved that the land belonged to that he was entitled to a decree for possession.

SPECIAL APPEAL from a decree passed by the Sarun, affirming that of the Sudder Moonsiff of that district.

Baboo Kally Kissen Sen, for Appellant.

Baboo Doorga Pershad, for Respondents.

The facts of this case are sufficiently set forth in the report of the High Court, (1) which is as follows :—

It appears to us that the judgments of the Courts below are perfectly right. The plaintiff sued the defendant as his tenant for arrears of rent. The defendant thereupon set up a plea that he held under a third party, and denied that he held under the plaintiff. The plaintiff, instead of proceeding to enforce this claim, withdrew his suit, and now sues to eject the defendant on the ground that he has, by his own disclaimer, forfeited all right to hold the land under him. The only question in such a case is whether the plaintiff is entitled, as proprietor, to enter on the land. If he is so entitled, the defendant by his own disclaimer has abandoned all right to remain upon it. He cannot object that he does not hold under the plaintiff, and the next day the plaintiff takes him at his word, turn round and say that he is going to continue his holding under him. He must make his election one way or the other. The appeal is dismissed with costs.

(1) AINSLIE and McDONELL, J.J.

[CIVIL APPELLATE JURISDICTION.]

KE AHEER DEFENDANT; 1878
AND February 23.
IN SINGH AND OTHERS PLAINTIFFS.

Suit for Possession—Determination of tenancy—Onus.

Where a landlord sues to eject a ryot on the ground of his tenancy having expired, the tenant is not called upon to state the character of his tenancy until the plaintiff has given *prima facie* proof that it is of a permanent character and that it has terminated.

Where A sued to eject B, on the ground that a temporary settlement effected with him had expired. B set up a *guzashita* title to the land. The lower court disbelieved plaintiff, but called on B to support the title he had set up. B, failing to do so, gave A a decree: *Held*, that A's suit should have been dismissed when it was found that the evidence he put forward was unworthy of credit.

CIVIL APPEAL from a decree passed by the Judge of District A, affirming that of the Sudder Moonsiff of that District. Plaintiff sued to recover possession of 25 bighas 9 cottahs of land. The defendant claimed the land to be his hereditary *guzashita*. The Moonsiff settled the following issues: (1) Whether the land in dispute is the temporary holding of the defendant or the *guzashita* permanent right; and (2) whether the plaintiff had given notice to the defendant to relinquish the land. He found in favour of the evidence of the plaintiff's witnesses, but gave him a decree for possession of 16 bighas 15 dhurs, on the ground that the defendant had failed to prove his *guzashita* title to that portion of the land. Defendant appealed, but his appeal was dismissed. He brought this special appeal.

Taruck Nath Palit, for Appellant.

Saligram Singh, for Respondent.

Judgment of the High Court (1) is as follows:—

The plaint in this case contains allegations that the defendant was holding under an ordinary lease for a term which had expired and that he was subsequently holding from year to year tenancy was determined by a notice to quit. On these facts, it is clear that the plaintiff could only succeed on

(1) *AINSLIE and McDONELL, J.J.*

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proof of notice, whether he was bound or not bound to case with some evidence of the terminable character of defendant's tenancy. That tenancy having been admitted defendant could not be called upon to prove its character; the plaintiff had proved so much as would be necessary to an end if it turned out to be terminable.

Both the lower Courts have overlooked the well-known principle that the plaintiff must succeed on the strength of his case and not on the weakness of that of his adversary. The defendant gave evidence of the character of the defendant's tenancy and notice to him to quit; but the first Court held that the evidence was not worthy of credit, therefore it ought to have been dismissed; but, instead of doing that, the Moonsiff went into the nature of the defendant's tenancy, and found that the defendant had 16 bighas some odd cottahs he was not protected from eviction and thereupon gave a decision in modification of the plaintiff's claim. The defendant appealed, but the plaintiff did not. The record does not show that there was any cross objection taken under section 348; not only was this objection not reduced to writing as by the rules of the Court it should have been if there had been an objection, but the judgment of the lower Appellate Court sets out the points that were before the Judge for consideration. The record does not allude to any cross objection taken by the plaintiff. The only questions then before the Judge were whether the defendant had rightly determined the character of the defendant's tenancy and whether, even if he had rightly determined it, the decree made by him was a decree that ought to have been reversed. The Moonsiff's finding as to the want of trustworthy evidence as to the verbal lease and notice were unchallenged, and the Judge, on appeal of the defendant, had not before him the question whether the findings in his favour were correct. As the defendant was not for an adjudication of the character of his tenancy, nothing to prevent the Judge from giving his opinion; at the same time he ought to have reversed the decree, even if he refused to allow the appeal on the point of the character of the defendant's holding, on the ground that the plaintiff had not started his case and had never done so at all. The appeal was dismissed with all costs.

[CRIMINAL APPELLATE JURISDICTION.]

ADHUR RAI APPELLANT.

1878
March 28.
April 1.

Order—*Culpable homicide—Presumption from probable consequences of an act.*

The appellant, having armed himself with a sword, struck in the dark certain persons in a house, causing wounds which resulted in the death of one person.

Held: per JACKSON, J.—That such conduct raises an inference that it was intended to cause death.

Per AINSLIE, J.—That though he probably did not see how his blows were directed, as he struck them with a deadly weapon regardless of consequences he must have known that his act is imminently dangerous, that it must, in all probability, cause such bodily injury as was likely to cause death.

Per CUNNINGHAM, J.—That the offence was culpable homicide and not murder, being an unpremeditated act of reckless violence rather than an act done with the knowledge or intention which is essential to constitute murder.

CRIMINAL APPEAL from an order passed by the Sessions Court of Sarun, convicting the appellant under section 302 of the Indian Penal Code, and sentencing him to transportation for life.

The appeal was heard by JACKSON and CUNNINGHAM, J.J., and, as they differed, it was heard by AINSLIE, J., as a third Judge.

The facts will sufficiently appear from the following judgments which were delivered by the High Court (1) :

Per, J. :—

March 28.
JACKSON, J.

In my opinion the conviction was right.

The accused Bejadhur was angry with Ram Soondur, now deceased, because the latter had pulled up a stake planted by Ram Soondur, nephew of the accused, for the purpose of hindering ingress and egress of a woman kept by one Abhiak. The accused followed Ram Soondur to the house of his father, the deceased Ajhas. They abused each other ; Bejadhur then was

(1) JACKSON, AINSLIE and CUNNINGHAM, J.J.

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about to strike Ram Soondur with a *lati*, on which wrested it from him and threw it away. Bejadhur then went to his house and fetched a sword and attacked the father of the son who seem to have been unarmed. It was "two of night," that is, after dark. Bejadhur first wounded the son, inflicting a cut on the left fore-arm, described by the Assistant Surgeon as a big incised wound extending and dividing the bones and soft structures. Ajhas dropped, and Bejadhur then cut at Ram Soondur, inflicting a wound which severed the thumb and forefinger from his left hand, also an incised wound on left fore-arm, and a similar one on the side of the right arm; all of which the Assistant Surgeon considered to have been sword-cuts. Ram Soondur died in the course of the night from loss of blood and shock to the head. Ajhas, after he had recovered consciousness, was taken to hospital, where he remained 2½ months.

In such circumstances I should have no difficulty in saying, first, that the accused had caused the death of Ram Soondur by an act done with the intention of causing such bodily injury as he knew was likely to cause death; or, second, that he and the other two men in the dark, well knowing that to do so was extremely dangerous that he would in all probability cause the death of one or both of them, and in fact thereby causing the death of one. Indeed, it would not be too harsh an inference to say that, armed with a sword attacks first one and then another man, and wounds them both in the manner described, he intended to cause death. That the blows fell on parts of the body whose wound is not necessarily fatal is an accident probably due to their having raised their hands or arms to protect a part of the head.

Assessors frequently shrink from the responsibility of a judgment which may entail a capital sentence, and for this reason attach little weight to their opinion in the present case. My brother Cunningham is of a different opinion, the case being laid before the third Judge.

CUNNINGHAM, J.:—

I think that the assessors were right in acquitting the

under section 302, and convicting under sections 304 and 326, Penal Code, inasmuch as the facts of the case do not lead me to necessitate the inference that the act which caused the death was done with the intention of causing either death or grievous bodily injury as the offender knew to be likely to cause death, or grievous bodily injury sufficient in the ordinary course of nature to cause death, or with the knowledge described in paragraph 4 of section 300. The evidence to my mind establishes a culpable homicide such as is provided for in the last clause of section 304, where there is a knowledge that the act is likely to cause death but no intention to cause death or a fatal wound : the prisoner in fact, I think, struck without regard to consequences.

A quarrel arose one night about a woman, kept by one Abhiak Nambhunjan; the prisoner's nephew objected to her, and put a stool in front of her door to annoy her. Ram Soonder, coming to the house and being complained to by the woman, pulled up the post. Then the prisoner and Nambhunjan came to Ajhas Rai's house, and used abusive language. The prisoner tried to strike Ram Soonder with a *lattie*, but the *lattie* was seized by Ajhas Rai and taken away. Then the prisoner went to his house, got a sword and inflicted the wound for which he has been convicted of murder. He first inflicted a wound on Ajhas Rai which did not result in death; he then struck Ram Soonder on the hand, the wound being four inches long and apparently nearly severed the thumb and finger from the hand. There was another wound skin deep on the left arm and another on the right.

A scuffle took place in the dark; the by-standers wrested the sword from the prisoner, who then ran off. The Surgeon inferred that the shock and profuse hæmorrhage from the wound might have contributed to the death of the deceased.

The facts seem to me to point rather to an unpremeditated and reckless violence than to the sort of knowledge or intention which is essential to murder. It is not proved to my mind that the prisoner intended to inflict a wound that could endanger life, nor was the Surgeon asked whether it was in the ordinary course of nature that such a wound should cause death. I think doubtful whether it was, and at any rate the prisoner may

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not have known it to be so. And I think, therefore, that 304 and 326 more properly meet the case than the section which the prisoner has been convicted.

April 1. AINSLIE, J. :—

AINSLEE, J.

I concur with Mr. Justice JACKSON in thinking the prisoner was rightly convicted of murder. In the course of an altercation with Ram Soonder, he attempted to strike him on the head with a stick, but this was wrested from him by Ajhas and thrown away. He then went into the house, armed himself with a sword, and returning attacked both of them; it was nearly dark at the time, and probably he did not see very clearly how his blow was directed; but it seems to me impossible to doubt that he attacked them with a deadly weapon, regardless of the consequences, and that he must at least be taken to have committed the offence with the knowledge that his act was so imminently dangerous as to be likely to cause such bodily injury as would cause death. There is no one of the exceptions to the rule which applies to the case. I do not see that we can give the benefit of the doubt in favour of a man who, giving way to passion, committed, without premeditation, an act of reckless violence with a deadly weapon, that he had no intention to cause such bodily injury as was likely to cause death; he clearly intends the probable consequences of his act, and a very probable consequence is the death.

The fact that he was deprived of self-control by passion does not help him unless the provocation be grave and sudden, and such as to bring the case within the exception. In this case it clearly was not so.

If we are to hold a man bound to use his reason before he strikes with his hands, we cannot excuse him on the ground that his reason was overpowered by passion, unless there be sufficient excuses for the overwhelming passion. I would, therefore, uphold the conviction.

[CRIMINAL APPELLATE JURISDICTION.]

BOODHOO JOLAHA APPELLANT.

1878
April 15.

Sentence of death—Probable accident in execution—Sentence commuted.

Where the condition of the convict rendered it likely that, if he were hanged, decapitation would ensue, the sentence of death was commuted to one of transportation for life.

HE referred to the High Court, under section 287 of the Code of Criminal Procedure by the Sessions Judge of Gya, for confirmation of the sentence of death passed on the prisoner on conviction of murder under section 302 of the Indian Penal Code. The convict also appealed under section 271 of the Code of Criminal Procedure.

It appears that, after committing the murder charged, the prisoner attempted to commit suicide by cutting his own throat.

In referring this case the Sessions Judge remarked: "I think it is proper to draw the attention of the High Court to the fact that the convict has received severe injury to the throat, and I forward herewith a letter from the Civil Surgeon in reply to the inquiry made by me regarding the effect of such injury if a capital sentence be inflicted on the convict."

The Civil Surgeon's report was to the following effect: "I examined the prisoner Boodhoo Jolaha, and beg to state, for your information, that in the neck of the prisoner there is an aperture communicating with the larynx through which air passes, and by means of which he could breathe even if the neck were compressed above it. I am of opinion, however, that the rigour of the law for capital punishment, if passed, can be carried out by allowing a very deep drop, so that dislocation of the neck may be the immediate result. But I beg most emphatically to point out that I cannot state positively that no untoward or distressing accident, such as the re-opening of the wound or the complete severance of the head, can take place."

The following judgment was passed by the High Court (1):
To dismiss the appeal, but, under the circumstances of the

(1) MARKBY and PRINSEP, J.J.

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case, having regard to the report of the Civil Surgeon of the March last as to the condition of the prisoner, we feel com to abstain from confirming the sentence of death passed upon and we order that, instead of suffering that sentence, he be ported for life.

[CIVIL APPELLATE JURISDICTION.]

March 1. GOOROO PERSHAD CHUCKERBUTTY } DEPENDENT
AND OTHERS. }

AND

BANI NATH CHUCKERBUTTY AND ANOTHER PLAINTIFFS

Sale for Arrears of Revenue—Auction purchaser from Government—Dependent Talook—Talookdary Right—Estoppel.

At a sale for arrears of revenue, Government purchased a talook containing a certain talook belonging to A. The talook was cancelled, and the Government made successive temporary settlements with A in which his talookdary right was recognized. The right of Government in the pergunnah were afterwards sold to B, and A. A afterwards joined with C in taking a patni lease of the land which he had in the talook. *Held*, in a suit by A against B and C, that this conduct estopped him from recovering possession of the talook from which he was ousted by B.

Khajak Assanoollah vs. Obhoy Churn Roy, 13 Moore's P. C. 317; 13 W. R., 24; cited and distinguished.

SPECIAL APPEAL from a decree passed by the District Judge of Dacca, affirming that of the Moonsiff of Kallygunge.

This was a suit to recover possession of a dependent talook in the Pergunnah Sharrippore. The Government had purchased the Pergunnah some time previous to 1822 (A. D.), and had settled it as a *khas mehal* up to the year 1269, when the whole of the Pergunnah in the mehal were purchased by Mr. V. defendant No. 1. At the time the Government purchased the Pergunnah, the ancestor of the plaintiffs was the owner of the dependent talook therein. The Government did not purchase the talook, but made successive settlements with the ancestors of the plaintiffs themselves, the last settlement expiring in 1269.

taking possession in 1270, ousted the plaintiffs, which was the cause of action alleged in the present suit. The settlement made by the Government with the plaintiffs previous to the settlement really made on behalf of both brothers, appeared in the name of Bani Nath alone. In 1273, Bani Nath and the other plaintiffs Nos. 2 to 5 took a settlement of the talook. Bani Nath afterwards sold a portion of the share in the putnee to the defendant No. 6.

Bree Nath Banerjee, for Appellant.

Chunder Madhub Ghose, for Respondent.

Following judgments were delivered by the Court (1) :—

J. :—

1878
GOOROO
PERSHAD
CHUCKER-
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CHUCKER-
BUTTY.
Judgment.

MORRIS, J.

That the plaintiffs are co-parceners of a certain property of their shikmi talookdar right. It appears that the property originally belonged to Government, who made temporary settlement with the plaintiffs as shikmidars entitled to the settlement. The last settlement ran up to the year 1269. In that year the Government sold its rights, as zemindar, to Mr. Wise, defendant No. 1, and he, in the month of Bysack 1270, ousted the plaintiffs and took the property into his own possession. It is the ouster of which the plaintiffs complain, eleven years and eleven months after date, and for which they seek redress from the Government to them of the property in question. Both the parties have given the plaintiffs a decree, following the decision of the Privy Council in the case of *Khajah Assanoollah Churn Roy*, 13 Moore's Ind. App., 317; 13 W. R., 24. The case, however, is complicated by the fact that in Magh 1270 plaintiff No. 1, in conjunction with defendant Nos. 2 to 5, took in putnee a portion of this property from Mr. Wise. The payment of bonus and on heavier terms of rent than was demanded by Government for the whole, and in Cheyt 1270 plaintiff No. 1 sold 1-anna share out of his entire interest in 10 annas 10 gundas in this putnee to the defendant No. 6. It is argued by the putnidar defendants that the plaintiffs who are co-parceners are estopped by this transaction from setting up their shikmi rights; that these shikmee rights are incompatible

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Judgment.

MORRIS, J.

with the existence of the putnee, and that in taking the the plaintiffs must be held to have relinquished their shikmeedars. Both the lower Courts have overruled this. The first Court in its judgment treats it in this manner. "How does that (i.e., the taking of the putnee by plaintiff with some of the defendants) ignore the existence of all rights he might have had in the property? Supposing, for instance, he had a right of occupancy in the property, created a higher right, say a putnee of the same, in connection with others, can it be contended that he is estopped from asserting his right of occupancy? It may be that the character of a putnee and a shikmee tenure are in some respects dissimilar inasmuch as they are not one and the same right, as to the consequences which they legally confer, the two are exactly the same as in the former case. The power of Mr. Wise possessed, and the revolution which he created through his district, must have choked all talookdars' mouths and led them to believe in the utter impossibility of recovering their rights against a powerful opponent,—a right which till now has not properly expounded, and which is scattered over various Government proceedings and regulations. I cannot, therefore, think that there was a wilful omission, if omission is to be called, or if it was necessary for them to speak of the right which they possessed." The Judge says: "I fail to see the mere fact of a plaintiff having accepted a putnee from Mr. Wise at a time when his right had not been established by the authority of the Privy Council's decision, or that he associated Ruten Dutt with him in the putnee, are reasons why he should not proceed against these persons."

We think that the reasoning of the lower Courts on this point is not sound. It is clear that the taking of the putnee by the plaintiff is inconsistent with the maintenance of the shikmee. Under the terms of the putnee pottah, the putneedar is to pay his rent direct from the ryots, but this of course he cannot do if an intermediate tenure, such as this shikmee, is allowed to be set up. By joining with them in the taking of the putnee, plaintiff No. 1 led the other parties to it to understand that he was willing to forego his rights as shikmeedar. If

h them a certain rental to the zemindar, but this rental puts it out of their power to realize by setting up a claim enables him to hold the land khas and in subordination at a lesser rental. The plaintiff No. 1 must be pre- to have known what his legal rights as shikmeedar were, before his conduct in taking the putnee must be held to the defendant says, a relinquishment on his part of puts.

it is contended that, as plaintiff No. 2 was no party to see, his rights as shikmeedar to the extent of his share, 1 anna 10 gundas, are not thereby imperilled. But we that the plaintiff No. 2 was no party to any settlement by Government with the shikmeedars. His right to a gundas share in this shikmee talook was recognized in a olehnamah by the other shikmeedars, and we have only his, and that of plaintiff No. 1, that he was really, though sibly, a party to the settlement which expired in 1269. It is clear, therefore, from all the circumstances of the case as really as much a party to the putnee as he was to the settlement, and that he holds the same relation in refer- the putnee as he did in reference to the shikmee talook. opinion, therefore, that he stands on exactly the same the plaintiff No. 1, and that the suit, as a whole, should dismissed. We therefore reverse the decision of the rt, and dismiss the suit with costs in all the Courts.

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Judgment.

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KEMP, J.

in the judgment just delivered. I merely wish to the plaintiffs include among the defendants the defend- who was not originally a party to the putnee. The after taking this putnee sell a 1 anna 10 gundas share the defendant No. 6, receiving from him a bonus, and the khas possession against the party whose putnee by themselves created.

[CIVIL APPELLATE JURISDICTION.]

1878
March 7.

RAM SOONDER SANDYAL . . . JUDGMENT-DEB
AND
GOPESSUR MUSTAFI . . . DECREE-HOLDER

Application to keep in force a decree—Application for sale of property under attachment—Application for transfer—Limitation Act, 1871, sch. II, cl. 167.

An application for the sale of certain properties already under attachment under an order made on a previous application by the same decree-holder is not an application to keep in force a decree within the meaning of the Limitation Act, IX of 1871, sch. II, cl. 167. Neither is a mere application for a certificate of transfer, in order to have the decree executed against the property of the judgment-debtor within the jurisdiction of the High Court.

SPECIAL APPEAL from an order passed by the Judge of Rungpore, reversing that of the Moonsiff of Bonga. *Baboo Mohiny Mohun Roy*, for Appellant.
Baboo Rash Behary Ghose, for Respondent.

The facts of the case are sufficiently set forth in the judgment of the High Court (1), which is as follows:—

The only question in this miscellaneous special appeal is whether the decreeholder's remedy is barred or not.

The original suit was for rent; the decree is dated the 1st of August 1864, and a certain sum of money became due from the judgment-debtor under the decree. On the 2nd of January 1865 the decree-holder applied under the provisions of section 212 of the Civil Procedure Code. Then there was a second application on the 2nd of November 1870, and the present application was filed on the 6th of September 1873. It is contended by the appellant for the special appellant that, if the starting point is the application under section 212, which was made on the 2nd of January 1865, then the present application having been made more than three years from that date, is barred. On the other

(1) *KEMP and MORRIS, J.J.*

ended by the pleader, who appears for the respondent, application of the 6th of September 1873 is within time, at previous application was made on the 22nd of November. That was an application to sell the interest of the judgment creditor in a certain decree and certain specified properties.

The pleader admits that this application of the 22nd November was not made under section 212 of the Civil Procedure Code. He says that it was an application to keep in force the attachment within the meaning of article 167 of schedule II of the Civil Procedure Act as interpreted by the Full Bench in *re Goomar Roy vs. Bhogobutty Prosonno Roy* 1 C. L. R., 23. But we think that this reasoning is wrong. The application being for certain properties already under attachment under an order made on the application of the 2nd of January 1869, it was an application to enforce the decree, and not one merely to keep the decree alive in the sense intended by the Full Bench. But the respondent contends, on the strength of the decision of Justices JAMES and ROMESH CHUNDER MITTER, to be found in 23 W. R., in *re Pylaroo Tuhobildarinee vs. Syud Nazir Hossein*, that the application of the 6th of September 1873 must be treated as an application to revive and continue the proceedings instituted on the application of the 2nd of January 1869, those proceedings having been stayed for a time, i.e., from the 19th December 1872 to July 1873, by reason of the judgment-creditor being prevented from maintaining by a regular suit instituted for the purpose, of the judgment-debtor to the properties under attachment by third parties. But we observe that the circumstances here quoted differ materially from those in the present case. Justice MARKBY, who delivered the judgment of the Full Bench, said: "Whatever may be the form of the last application, of the 6th December 1873, in substance it was an application for the continuation of the former proceedings on the ground that the bar that was set up by reason of the adverse order under section 246 had been removed by the decision in the present regular suit;" and, therefore, for these reasons the Judges held that it was not an application to execute the decree within the meaning of schedule II, article 167 of the Civil Procedure Act of 1871. Now, in the present case, we find that these

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MUSTAFI.

Judgment.

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 MUSTAFI.
 ———.
Judgment.
 ———.

remarks do not in any way apply. The present application by the decreeholder on the 6th of September 1873 follows: In the 9th column of the application, in which out the relief which he asks for from the Court, namely, t judgment-debtor's property being situated within the s of the Moonsiff of Nattore, it is necessary for him, the holder, to take out a certificate before he can attach the p within that jurisdiction; and he therefore prays the C forward a certificate of non-satisfaction to the Court Moonsiff of Nattore to enable the decree-holder to pro attach and sell the property situated within that jur. Further, with that application he presented the original of 1864 for rent, and the subsequent orders of the Ju of the High Court confirming that decree. It thus app the application contained no reference to the properties were the subject of the regular suit, and was not therefo in substance or in form such an application as was cou by Mr. Justice MARKEBY in his judgment in the case abov. It is not as though the judgment-creditor had represent the obstacle which existed to obtaining satisfaction by a decree of the Subordinate Judge of Rajshahye, in judgment-debtor had a title, had been removed by the of the proceedings under section 246; on the contrary, for a certificate to be sent to the Moonsiff of Nattor that he might proceed against property which, so f understand, was quite independent of the property, th of the regular suit, which suit had its origin in p adverse to the judgment-creditor under section 248. therefore, of opinion that the case relied upon by the p the respondent is not applicable to the circumstances of the present case; and, as it is clear that the applica section 212, which was made on the 2nd of January 1869, more than three years before the date of the present ap dated 6th of September 1873, and that the application 22nd of November 1870 is not an application to decree in force within the meaning of the Full Bench referred to, the judgment of the Judge must be rever of the Moonsiff restored, and the appeal decreed with co

[FULL BENCH.]

SHRUF ALI DEFENDANT;

1878
May 13.

AND

BACHMIPUT SINGH PLAINTIFF.

*In Law—Consent Decree—Heir in Possession—Debts of Deceased—
Party to Suit—Representative.*

Where a Mahomedan, dying indebted, leaves his property in possession of one of two or more heirs, the sale of that property under a decree obtained by a creditor of the deceased against the heir in possession will not pass the shares of the absent heirs.

From a decree passed by Mr. Justice MAUPHERSON in exercise of the original civil jurisdiction of the High Court, in favour of the plaintiff's claim.

The appeal came on for hearing before Sir RICHARD GARTH, Chief Justice, and Mr. Justice MARKBY, who referred the case to the Bench (1) in the following terms:

Buzlar Rohim died on the 24th of July 1871, leaving a daughter Fatimunnissa, a daughter Surfunnissa, and a sister Surunnissa, and three nephews (sons of a deceased brother), Aheea, Mahomed Moosa, and Mahomed Jakir.

The family is a Mahomedan one of the *Suni* sect. At the time of Buzlar Rohim's death, his sister Sudderennissa was at Mecca in Arabia. She had a son Muzharul Huq, who, at the time of his uncle's death, was living with the rest of the family in a small house at Sealdah. This son was of age, but he had no authority to act on behalf of his mother Sudderennissa; nor did Sudderennissa, as far as appears, any agent in this country authorized to act on her behalf. Buzlar Rohim in his lifetime possessed of considerable landed property in the district of Berhampore, and of houses situate in Calcutta and elsewhere. Part of the property in Calcutta consisted of a house No. 106, Jaun Bazar Street, and another house No. 11,

GARTH, O.J., JACKSON, KEMP, MARKBY, and AINSLIE, J.J.

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 SINGH.

Statement.

Suker Sircar's Lane, which two houses are the subject present suit. In the year 1868, Buzlar Rohim executed a mortgage in favour of one Durga Churn Law to secure the debt of Rs. 3,50,000. The debt was subsequently reduced to Rs. 3,10,000, and on the 22nd of August 1870, Durga Churn Law was paid off by the Land Mortgage Bank, and a fresh mortgage was executed by Buzlar Rohim in favour of the Land Mortgage Bank for Rs. 3,10,000. This mortgage included (together with the property situate in the 24-Pergunnahs) the houses abovementioned, and also other houses in the town of Calcutta. The mortgage was outstanding in the hands of the Land Mortgage Bank at the death of Buzlar Rohim in 1871. Buzlar Rohim's estate along remained in possession, and when he died, he still remained in possession of the whole of the property comprised in the mortgage.

"On the 9th of October 1871, a certificate in respect of the estate of Buzlar Rohim, under Act XXVII of 1860, was granted by the District Judge of the 24-Pergunnahs to the plaintiff Surfunnissa. On that occasion, Muzharul Huq, the defendant Sudderenissa, appeared, and stated that his mother was Surfunnissa, and was entitled to a six annas share of the property. On her behalf he opposed the grant of a certificate to Surfunnissa but was unsuccessful. On the 10th of May 1872, the Land Mortgage Bank instituted a suit in the Court of the District Judge of the 24-Pergunnahs against Surfunnissa and her co-defendants Mahomed Aheca, Mahomed Moosa, and Mahomed Jaffer, to recover the money due upon the mortgage.

"The defendants were not, in the heading of the plaint, named as the representatives of Buzlar Rohim, but in the body of the plaint they were said to be, together with the widow Fatimunnissa, the widow of Buzlar Rohim. Fatimunnissa was alleged to have a share to her daughter Surfunnissa, and therefore not a necessary party to the suit. And the plaintiff claimed against the mortgage the sum of Rs. 3,51,718-15-11, which was to be paid out of the estate of Buzlar Rohim, which was to be sold to the hands of the defendants or either of them. The plaintiff prayed that the mortgaged premises might be declared to be sold for the amount claimed, and might be ordered by the Court to be sold and applied in payment of the mortgage debt, and

cy might be ordered to be paid from the general estate of deceased.

the time when this suit was brought, persons named as therein, or some one or more of them, were in possession of the property comprised under the mortgage. The Land Mortgage Bank had reason to believe that Sudderenissa was then alive, and was at Medina. There was no evidence that Sudderenissa was aware of this suit being brought.

The suit was compromised by the respective vakeels of the Land Mortgage Bank and the 24-Pergunnahs, in accordance with which the District Court of the 24-Pergunnahs, to whose Court the suit had been transferred from that of the Subordinate Judge, passed a decree on the 1st of August 1872. The terms were that the plaintiffs should receive a decree for the amount of the claim set out in the schedule which was described in the decree as a claim to recover the amount due on mortgage, and for sale or foreclosure of the property mortgaged to the plaintiffs with interest at 12 per cent. from the institution of the suit, payable every six months; in default of payment compound interest to be charged; costs with interest at 12 per cent. to be paid at once. A year's time to be given to the defendants to find purchasers for the property, after which the Land Mortgage Bank was to be at liberty to issue execution in the suit. If the principal and half the costs could be realized within a year, then another year's time was to be given.

The parties did not succeed in affecting a private sale of the property mortgaged, and after the lapse of two years, the decree was executed by the Land Mortgage Bank. The sum of Rs. 56-10 was realized by execution in the 24-Pergunnahs, and the balance still due upon the decree, it was transferred to the District Court for execution in respect of that part of the mortgaged property which was situate in Calcutta. On the 22nd of March 1875 the District Court made an order for the attachment of the property in Calcutta, including the two houses in Jaun Bazar and near's Lane above-mentioned. The house in Suker Sircar's Lane was sold by the Sheriff on the 10th of June 1875, and on the 1st of July 1875, a certificate was issued that the appellant was entitled for the sum of Rs. 525 "the right, title, and interest as

1873

MIR ASHRAF

ALI

v.

BOY

LUTCHMIPUT

SINGH.

Statement.

1878 the same stood at the date of the mortgage mentioned
 Mrs. ASHRAF decree of the Court of the 24-Pergunnahs of Buzlar
 Ali deceased, the ancestor, and of the defendants Surfunni
 v. wife of Mahomed Aheea, Mahomed Moosa, and Mahomed
 Boy the representatives" in this house. The other house
 LUTCHMIPOT sold by the Sheriff, and a certificate in the same terms was
 SINGH. to the appellant. Both houses were taken possession of
 appellant.
 Statement.

"Sudderenisia returned to this country from Medina. She remained here about two years, and then again went to Medina. On the 1st of December 1875, she sold her interest in the six annas share, which she claimed in the Buzlar Rohim, to the respondent for the sum of Rs. 5,000. On the 12th of April 1876, the respondent filed this suit, claiming that it might be declared that he was entitled to a six-anna share of the two houses, No. 106, Jaun Bazar, No. 11, Suker Sircar's Lane, and that a partition be made thereof, and the respondent's share allotted to him accordingly; and he also prayed for mesne profits. Mr. Justice PHIPPS gave the plaintiff a decree according to his prayer."

"The defendant appealed. On appeal the appellant contended that the sale by the Sheriff in execution of the decree of the District Court of the 24-Pergunnahs, was effectual to pass as vendee the whole interest of Buzlar Rohim in the two houses which had been mortgaged by Buzlar Rohim to the Mortgage Bank. The respondent, on the other hand, contended that Sudderenisia, not having been a party to the suit in the District Court, her share in these houses was not affected by the decree in that suit, and did not pass upon the Sheriff's sale. The appellant also contends that Sudderenisia was not entitled to a six-annas share of the property of Buzlar Rohim, but only to one-seventh of six annas, the remaining six-sevenths being divided equally amongst the nephews of the deceased, Mahomed Aheea, Mahomed Moosa, and Mahomed Jalil. The last point will only arise in case the appellant fails upon the first point, and the consideration of it may, therefore, be postponed for the present."

"As regards the first point, there seems to be a...

as to whether, under such circumstances as are discussed in this case, the sales made by the Sheriff of the property would pass the share of Sudderennis to the appellant being at that time at Medina, having no notice of the sale, not being an actual party to it. The decisions in Appeal No. 134 of 1875, in 24 W. R., 383, in 10 B. L. R., 294, and Marshall's Reports, 614, were relied on by the appellant. The last of these cases is reported somewhat differently in the special Number of the Weekly Report, 119; and also in 3 B. L. R., 37 F. B., 15 B. L. R., 142, and 1 Cal., 138. The respondent relied on the decisions in Appeal 1218 of 1875, in 14 W. R., 448, and 5 B. L. R., 27. Both sides relied upon the decision of the Allahabad Court, reported in I. L. R., 1 Alla., 57. The question, therefore, which we desire to refer to the Bench is, whether, under the circumstances, the property should pass to the appellant."

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Statement.

and *Ameer Ali*, for Appellants.

—It was not necessary to make Sudderennis a party actually, so long as she was properly represented. She is substantially, though not actually, a party within the meaning of the decree—*Ishan Chunder Mitter vs. Buksh Ali* Marsh., 614.

C.J.—It was admitted in that case that the only way in which a widow could be made a party was as guardian to the property. She had no interest, though certainly from the proceedings there it might seem otherwise. But here she had a title to a portion of the property in her own right.

—The fact of her having a separate share makes no difference. It is all a question of representation—see Marsh., *Farland's F. B. Rep.*, p. 120; *Sudaburt Prosad Saha vs. Koor*, 3 B. L. R., 31 F. B.; *Sham Coomar Roy vs. Bebe*, 14 W. R., 448; *Rajah Raj Kristo Singh vs. Mahun Baboo*, 14 W. R., 448, note; *Hukeem Bebe vs. Browhur Ali*, 5 Wyman, 27.

C.J.—Do you contend that, if a testator dies and

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 Mrs. Ashraf Ali & Roy Lutchmiput Singh. Argument.
 the estate is divided amongst his heirs, a creditor could of the heirs as representing the rest, and sell the shares under the decree against him?]

Jackson.—Yes; if, as in this case, the person suing possession of the property—*Hedaya*, Book 20, Ch. 4, 1791, Vol. II, p. 655).

[Counsel cited and commented on *Hendry vs. Mutty Lal*, I. L. R., 2 Cal., 395; *Manager of Durbhunga Raj vs. M. Coomar Ramaput Singh*, 14 Moore, 605; 10 B. L. R. *Rajah Rujhoo Nundun Singh vs. Wilson*, 23 W. R., 30; *himia Chunder Roy Chowdhry vs. Ram Kishore Acharjee*, 15 B. L. R., 142, 144; *Powell vs. Wright*, 7 Beavan, 442; *Cockburn vs. Thomson*, 16 Vesey, 325; *Mussamut Nuss Moulvie Ameerooddeen*, 24 W. R., 3; *Lalla Seeta Ram Buksh Thakoor*, 24 W. R., 383].

Under no circumstances can a party come into Court that his position shall be improved by reason of his age—*Calvert on Parties*, 49, 63, 65, 66, 67, 79. Sections Act VIII of 1859, are also in my favour. The right of heirs in Mahomedan law is connected with the estate of the deceased on the sole condition of its being free from incumbrances—*Hedaya*, Bk. 25, Ch. 3 (Vol. III, p. 1791). The estate does not vest in any heir till all debts are paid. Till then the property is held, as it were, in trust for creditors; and a decree against the heir in possession will bind the whole of them.

[GARTH, C.J.—If the property does not vest till all debts are paid off, where is it in the meantime?]

Jackson.—The property is in each and in all. Each has a full right of representation for the purpose of clearing incumbrances. *Hamir Singh vs. Mussamut Zakia*, I. L. R., 57, makes a distinction which is in my favour. And section 203 of Act VIII of 1859, the whole property of the estate if in the hands of one representative, may be taken in execution of a decree against such representative.

[JACKSON, J.—Does not section 203 contemplate only the case of one representative?—*Sadaburt Pershad Saha vs. Koer*, 3 B. L. R., 31 F. B.

STH, C.J.—It is a mere section of procedure. Surely, 1878
not intended to change, if it does change, the Mahomedan MIR ASHRAF

case contended that the authorities showed that, in the ALI
Mahomedan law, (1) the estate did not vest separately till the v.
debts were paid off; and that (2) the creditor of a testator ROY
could not bind all the property in his possession, LUTCHMITUP
if belonging to him or not. These two points completely SINGH.
settled the case. Argument.

Ali, on the same side, cited Macnaghten's Mahomedan
p. 87, case 8; *Hulkhory Lall vs. Sheo Churn Lall*, 24
109.

Reddy, Branson, and Bonnerjee, for the Respondents.

Reddy.—The effect of the passage from 3 Hedaya, p. 165,
ch. 3) is merely that the shares are taken subject to
See *Bailie's Mahomedan Law*, title inheritance, p. 693. If
attention of the other side be correct, a wrong-doer in
possession would have power to bind the estate.

Boon, J.—As I understand the argument of the other side,
that the heirs take no shares until the debts are paid; that
the property is kept together till then, and then divided.]

Reddy.—Hedaya, bk. 52, ch. 7, (vol. IV, p. 542) shows that
two executors cannot sell the goods of the testator
without the concurrence of the other. Why, on general prin-
ciple, should one heir have greater power over the share of his
co-heir? But taking for granted what the other side contend
is the effect of a decree against an heir in possession,
under the Mahomedan law, the introduction of such a doctrine
change the ordinary practice of the Court, and therefore it
is taken with all its exceptions. Now, there is one case
by and absolutely excluded, namely, that of a consent
under which the decree in the present case is.

Boon, (on the same side)—We admit that the share of
Buzlar Robim would be liable for the debts of Buzlar Robim.
There is no dispute about that. The only question is, did the
Mortgage Bank take the proper course to render that
share liable. It is this, we contend, they have not done. The

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 SINGH.
 ———
Argument.

law of procedure set out in Mahomedan Law Books is in force here. The only law of procedure in the M is the Code of Civil Procedure; and, therefore, even i Mahomedan law must be followed when it says that the of Sudderennissa is liable in her hands for the debts of Rohim, the means of making that share liable must be as required by the Code. In the passages which have been from the *Hedaya* it is nothing more than a mere administrative suit that is referred to, and neither in the Mahomedan in the English law need all the parties be before the suits of that nature; the present suit is, however, of a different character, and is not to be confounded with. Once it is admitted that the law of procedure to be the Act VIII of 1859, there is hardly any further question argued. It is clear that nothing can pass under a sale the provisions of that Act but the right, title and of the judgment-debtor.

Counsel went on to distinguish the present case from cited in favour of the other side. He referred to *Specie* No. 134 of 1875; *Mohima Chunder Roy Chowdry*; *Kishore Acharjee Chowdhry*, 15 Ben., 142; *Deen Dyal Jagdeep Narain Singh*, 1 C. L. R., 49; *Calvert on Partis*

1878
 May 18.
 GARTH, C.J. The following judgments were delivered:—
 GARTH, C. J. (KEMP, and JACKSON, J.J., concurring):—

I am of opinion that the property in question did not pass to the defendant under the sales made by the Sheriff.

It may be that, if the suit instituted by the Land Bank on the 10th of May 1872, had been brought in proper time and if the proceedings in that suit had been conducted in due conclusion in the regular course of law, the decree might have been binding upon Sudderennissa, and this property might have been sold under that decree; but in point of fact, the suit was brought advisedly against certain other persons as the representatives of Buzlar Rohim, expressly excluding the name of Sudderennissa, upon the ground that she had sold her share of the deceased's property to her daughter Surfunnissa; and

ion of Sudderennis and her share, although the plain-
 te suit knew perfectly well that she was entitled to a share
 and they had reason to believe that she was alive at Me-
 a decree was then passed in that suit, not adversely to the
 at or in the usual course of proof and procedure, but
 nt,—a decree by no means of an ordinary character, and
 Court, except by consent, would clearly not have been
 in making. This decree, which was passed in the Court
 Pergunnahs, professed to charge the property in ques-
 tion (which was situate in Calcutta, and therefore beyond the
 on of the Court), with the payment of the mortgage
 interest; and it contained provisions for sale of the pro-
 perty in private contract, for delaying of execution, and as to the
 interest, which could not have been effected, except by pri-
 vate arrangement. The amount of the mortgage money and in-
 terest having been realized in the 24-Pergunnahs under this
 decree, it was transferred to this Court to be executed upon the
 property in Calcutta; and it appears that, under certain sales by
 the Court and certificates issued by the Court in accordance
 with the sales, the right, title and interest, not only of the de-
 ceased who consented to the decree, but also of the deceased
 Rohim, was professedly purchased by the present ap-
 pellant. The question, however, of what legally passed by these
 sales, does not depend altogether upon the form of the sale cer-
 tificates, because if this Court, professing to act under that decree,
 had the property to be sold, the sale of which the decree
 warranted, it is clear that the sale, *pro tanto*, might be set
 aside as a regular suit. No order of this Court could enlarge
 the rights of the plaintiff under the decree, nor could the form
 of the certificates confer upon the purchaser at the sales a
 title which the Court had no right to dispose of.

The question, therefore, comes back to this: Whether the decree,
 as thus obtained, affected the share of Sudderennis, who
 was a consenting party to it; and this question must in
 the end be determined by the Mahomedan law, so far as
 the law upon the subject can be ascertained. It was strongly
 urged by Mr. JACKSON, on behalf of the appellant, that
 the sale of the immoveable property of Buzlar Rohim was

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in the possession of the defendants in the above suit, the defendants by Mahomedan law represented the entire estate of Buzlar Rohim, and the decree against them bound the share of Sudderennissa, as well as their own shares, and in support of this construction he relied upon the following passages from Hedaya.

GARTH, C.J. In Book XX, ch. 4 (relating to the duties of the kazees) it is said: "Any one of the heirs of a deceased person stands as agent on behalf of all the others, with respect to any thing done to or by the deceased, whether it be debt or substance, &c." To this it is objected, "If an heir be litigant on behalf of the others, it would follow that each creditor is entitled to have recourse to him for payment of his demand, whereas, according to Mahomedan law, each is only obliged to pay his own share." Reply: "The creditors are entitled to have recourse to one of several heirs in a case where all the effects are in the hands of that heir. This is what is stated in the Jarna Kabeen, and the reason for it is, that although any one of the heirs may act as plaintiff in a cause on behalf of the others, yet he cannot act as defendant on their behalf, unless the whole of the effects be in his possession." Assuming that these passages do establish, that according to Mahomedan law, if the whole of the immoveable property of a deceased debtor be in the hands of one of his heirs, that heir may be sued by a creditor as representing the entire estate, so that a decree obtained against him would be binding as against the other heirs; it does not appear from the text of the Hedaya how far the rule thus laid down would be applicable in the case of a suit brought against two or more of several heirs who are all in possession of the property, nor whether the heirs who are not sued should be expressly charged as representing the whole estate of the deceased, nor whether the absent heirs should be mentioned in the proceedings.

But it appears clear from another passage in the Hedaya, which our attention has also been called to, that an absentee would certainly not be bound by a decree obtained in such proceedings unless the proceedings are duly conducted, and the plaintiff proved in open Court; and that a decree by consent of the parties who are present would not be binding on the other heirs. In

X, Ch. 1, on the subject of partition, it is said: "As a man sues for a debt against an estate, and an heir or ¹⁸⁷⁸ acknowledges his claim, in which case such acknow- ^{MIR ASHRAF} ^{ALI} ^{v.} ^{ROY} ^{LUTCHMIPUT} ^{SINGH.} as being to the detriment of the others, is not ^{Judgment.} ^{GARTH, C.J.} but the claimant must produce evidence before the his suit, even against that heir or executor, before he publish his claim against the estate in general to the pre- the other heir." This appears to me a direct authority, decree by consent against one heir of a deceased debtor legally bind the other heirs; and this rule is founded on manifest justice; because, although for the sake of peace, the share of an absentee heir may be bound by pro- taken in open Court and in due course of law, as in the presence and sanction of the Judge, and the pub- lity of the proceeding, operates as a protection to the and as a guarantee for the *bona fides* and justice of the self, it is obviously very different in the case of a decree solely by consent, because there the absentee is entirely mercy of the consenting party, and there is no security either for the justice of the decree, or for the protection of the absentee heir from any fraud or collusion, which may be against him.

suggested in answer to this argument, that in the case in which we are dealing, the proof of the creditor's debt would be almost a matter of form; but it would be extremely dangerous for us, in my opinion, to allow any consideration of this to operate as an exception to the above rule. If we did so, it would be necessary in each case to enquire, not merely whether the decree was obtained by consent, or in due course of law, but whether, if obtained by consent, the proof of the debt would have been easy or difficult, and in point of fact to go into the evidence in each instance ourselves, for the purpose of ascertaining how far the consent was justifiable. Besides, there is not whatever, as I observed before, that in this particular case the decree which was obtained was irregular, and one which was not in due course of law the Judge could have no right what- soever to make.

of opinion, therefore, that this decree and the execution

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 MRS ASHROF founded upon it, did not affect the share of Sudderens  
 estate of the deceased, and consequently, that the prop  
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 ALI question did not pass under the sales made by the Sheri
 v. question did not pass under the sales made by the Sheri
 Roy ciding this question upon what I believe to be the Mal
 LUTCHMIPUT law, as applicable to the circumstance of the case, I do
 SINGH. sider it necessary to discuss the various authorities to w
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 Judgment. attention has been directed, many of which are, no dou  
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 GARTH, C.J. difficult to reconcile with one another. The case will go
 the Division Bench for ultimate disposal.

MARKBY, J. MARKBY, J. :—

The question referred to us in this case is whether, in the circumstances stated in the reference, certain property consisting of a share in two houses, situate in Calcutta, passed to the person who is appellant in the appeal in which the reference was made. Although I am compelled, by the nature of the question, to go into the details of the facts, and the arguments addressed to us, to go into the consideration of general principles, I desire it to be understood that my judgment ultimately upon the circumstances stated in the reference, and which must be taken, therefore, as in accordance with this judgment.

It was contended for the appellant that he was entitled to have the question put to us answered in the affirmative upon the simple ground that the decree in execution of which the property referred to was obtained in a suit framed under the Mahomedan law, was rightly framed.

In order to arrive at any satisfactory conclusion upon this point, it appears to me necessary to consider what are the general principles of Mahomedan law in reference to the payment of debts out of the estate of a deceased person.

Under the Mahomedan law, taking that law as stated in Hedaya, it is, I think, clear that the estate of a deceased person descends entire, together with all the debts due to him, owing to the deceased; that it is, therefore, to use a convenient expression, adopted by lawyers a universal estate. I also think that strictly speaking there ought, according to the Mahomedan law, to be in every case of death a very similar to what we should call an administration.

by a Court of Justice, that is to say, a liquidation of the estate under the superintendence of the kazeer, followed by a partition of the residue. It seems, however, that a liquidation of the estate out of Court was to some extent recognized under the strict Mahomedan law. Of course, if there were a liquidation of the estate by a Court of Justice, there would be no question of any personal liability of the heirs, but if there were no such liquidation, or such liquidation were incomplete, the heirs upon taking possession then each became liable to pay his own share of the debt. I need not now consider whether under the true Mahomedan law this liability was *pro portione* or *pro portione emolumentum*. But whichever it was, this liability of the individual heirs was, as I understand it, something distinct from what I may call (to use an English expression) the liability of the estate."

I think it clear that under the strict Mahomedan law the liability of the estate remained, if the creditors chose to resort to that remedy, until the debts had been completely paid. Though the Court would, of course, avoid disturbing existing arrangements if the creditor could be satisfied in any other way. If this be so, it follows, I think, that on the death of a Mahomedan neither his estate vested immediately in his heirs, nor did his heirs become immediately liable to his creditors until the heirs came forward to take possession the estate was vacant (*hereditas jacens*). But by a fiction the deceased owner was supposed, during this interval, to be representing the estate itself; (*quia creditum est hereditatem dominam esse locum obtinere*.) It is particularly to be observed, that it was the deceased owner and not the heirs who were represented (*persona vicem sustinet non heredis futuri*). For many purposes this fiction was enough. There were some transactions which could not be deferred, which required the action and judgment of a responsible person. For the conduct of such transactions various fictions have been devised. Roman lawyers considered that the deceased owner, who himself belonged to the past, could answer the purpose. Very frequently a special person had been appointed as an *ad-interim curator* or manager of

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1878 the estate. Under the Mahomedan law it appears to me
MIR ASHRAF such transactions one or more of the heirs themselves
ALI proper persons to represent the deceased.
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ROY These I consider to be the general principles of the
LUTCHMIPUT Mahomedan law of succession, so far as they relate
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MARKBY, J. we must consider the Mahomedan law generally, as to
 have only somewhat imperfect information. But upon
 which I specially rely are those passages of the
 which were quoted in the argument in this case, namely,
 pp. 654, 599, vol. 3, p. 164, 209, vol. 4, pp. 6, 539, 30 (ed

If I have correctly gathered the principles of the Ma
 law from these texts they are part of that Mahomedan
 succession which our Courts are bound to administer,
 far as they have fallen into disuse, or have been mod
 custom or by legislation. I may also observe that the
 ples are rational in spirit, and they are probably derived
 very same source as the general law of Europe on the
 succession, with which they are, in the main, identical.
 show this identity, and also to enable me to express m
 with greater clearness and precision that I have quoted
 there the familiar and accurate expressions of the Roman
 on this subject.

The administration of the estate by the kazeer has
 disuse, and the creditor must, therefore, if he wishes
 his entire claim, enforce it against the estate in some so
 framed for the purpose. There are some passages of t
 which might almost seem to lead to the inference that
 the heirs, whether in possession of the estate or not, m
 defendant in a suit brought to charge the estate. I think
 that at the present day there would be danger of collu
 as the Courts might be unable to detect, if a perso
 interested only to an insignificant extent could be mad
 defendant in a suit to establish a claim against the es
 bably, therefore, our Courts would at least require that
 should be substantially represented. This, however, is
 which I only refer by way of precaution, for in the
 the Land Mortgage Bank brought against the repre

Rohim the estate was substantially represented. The sued were in possession, if not of the whole of the estate deceased, at least of that part of it which the Land Mortgage Bank sought to make liable for their debt. Nor is there the suspicion of collusion. If, therefore, we are to apply the law of the Mahomedan law at all, I think it impossible that a suit brought to enforce a claim against the estate of a person is improperly framed when all the persons who had possession of that particular portion of the estate which it was to charge are made parties to the suit.

Therefore, as the frame of the suit is concerned I think no valid objection can be taken to it. But even admitting that a correct view of the Mahomedan law, there is still an objection to the decree of the District Judge of the 24-Pergunnahs, on which this property was sold, and one which arises from the Mahomedan law itself. This decree was a decree by the consent of parties, and one of the passages I have quoted shows that a decree to establish a claim against the estate of a person, under any circumstances, to be made by consent; for the reason that the very object of bringing the suit in is to bind the estate, in other words to bind absent

Therefore, the question which we had now to determine was whether between the Land Mortgage Bank and Sudderrenissa, the decree of the District Judge of the 24-Pergunnahs could be set aside by the latter, I should certainly have very great difficulty in answering this objection. Moreover, viewed as a question between the Land Mortgage Bank and Sudderrenissa, this adds an additional difficulty. It appears that, knowing as the Bank did that there had been a daughter, Sudderrenissa, and it was doubtful whether she was alive or dead, the Bank suppressed in their plaint all mention of her when they took upon themselves to inform the District Judge of the 24-Pergunnahs that the representatives of Buzlar Rohim were. There can be no doubt that the effect of this might be to lead the Court to think that all the persons interested in the estate were before the Court and consented to the decree. This would not, strictly speaking, be the case. The Court in establishing a claim against the estate

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without further evidence, as pointed out in the Hedaya in the passages above referred to. But still the Bank ought not to have made this statement; and, though it was very likely without any wrong intention, it would seriously embarrass the Bank if they were now insisting upon the decree. But this is not a suit by the Land Mortgage Bank, nor are the Land Mortgage Bank in any way now seeking to enforce their claim. The suit is brought by one of the heirs of Buzlar Rohim, the defendant to recover property sold to him under an order of this Court, for a debt to discharge which that property is undoubtedly liable. In order, therefore, to decide this case, it seems to me necessary to go somewhat further and to consider what is the position of an heir in this country who comes forward to claim property which belonged to his deceased ancestor, the property which has been sold in payment of the ancestor's debt.

It is clear from the principles of the Mahomedan law laid down in the earlier part of this judgment, that the right of an heir to claim the property of his deceased ancestor, who died intestate, is a right of representation only, and except as represented by him he has no right to the property whatsoever. The question before us, therefore, at the very outset assumes a special form. It is not the simple case of an owner of property asserting his rights of ownership, but of an heir asserting his rights of representation. I think it impossible to deny, in the decisions to which I am about to advert, that under the law of this country there is between these two questions a very clear distinction.

The first case to which I desire to advert is one which is quoted in the argument. It is reported in 3 Select Reports. In that case one Lukhee Khwaree was supposed to be the proprietor of a revenue-paying estate. Whilst she was in possession she borrowed money from the plaintiff to pay the Government revenue. It was shown that with this money the revenue was paid. The first Court found these facts, and also that the plaintiff *bonâ fide* advanced the money in the belief that Lukhee Khwaree was the proprietor. There was no allegation that she was in difficulties or in danger of being sold, or that the income was insufficient to meet the Government revenue; but I take

ney was borrowed in due course of management. Subsequently it was discovered that the true owner of the property was Surruswuttee Debia, and the plaintiff then sued both Khwaree and Surruswuttee to recover the amount lent by him. The ultimate decree was, that the plaintiff should recover the amount from one or other of the defendants, or from both of them, and that, if the debt was not liquidated, the estate should be sold in satisfaction of the debt. This decree, though loosely expressed, is perfectly intelligible upon the principle that the estate of a deceased person *vicem defuncti non heredis futuri sustinet*, and that Lukhee was taken to have been acting as an *ad interim* manager of the estate representing the deceased. That the decision was substantially right cannot now be disputed, as it has been cited with approval by the Privy Council in the case of *Hunooman Persaud Pandey vs. Mussamut Koonwaree*, 6 Moore's Indian Reports, 413.

The case of *Hunooman Persaud Pandey* also bears upon the question in one of its aspects. A Hindoo possessed of an estate died indebted. After his death his widow got registered as co-proprietor with her infant son, and took possession of the estate. Whilst in possession she expended various sums of money, partly to pay off old debts, partly to pay revenue, and partly for purposes not stated, but she was acting in due course of management, had she in fact been managing on behalf of another. The Sudder Court thought that she did in fact borrow as proprietor and not as manager, and upon this ground, when the son came of age, made a decree, the general effect of which was to set aside all the transactions of the mother. The Privy Council differed from the Sudder Court in the view which they took of these transactions. They thought that the acts of the widow ought properly to be treated as acts done by her as manager on behalf of another. They observed, however, these observations upon the law as applicable to the case found by the Sudder Court: "It is to be observed," they said, under the Hindoo law, the right of a *bond fide* incumbrancer who has taken from a *de facto* manager a charge on lands honestly for the purpose of saving the estate, or for the benefit of the estate, is not, (provided the circumstances would

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support the charge had it emanated from a *de facto* manager) affected by the want of union of the *de facto* with title. Therefore had the Ranees entered into the estate and even practised a deception upon the Court of Wards, the Collector exercising the powers of a Court of Wards, to set forth a case of joint-proprietorship in order to defeat the powers of a Court of Wards to the wardship, it would not follow that those acts, however wrong, would defeat the claim of the Ranees. The objection, then, to the Ranees' assumption of proprietorship in order to get the management into her hands, does not really go to the root of the matter, nor necessarily defeat the charge. Consequently, even had the view which the Dewany Adawlut took of the character of the Ranees' management having been done by her as guardian, been correct, their objection against the charge without further enquiry would not be well founded. It would not have been accordant with the principles of the Hindoo law as declared in Colebrook's Digest, p. 302, and in the case of *Gopee Churn Bural vs. Marwarree Lukhee Debia*, 3 S. D. A., 93, and as illustrated in the case cited for the appellant in the argument against the charge, of which no opposing decision was cited."

It does not seem to me that these observations were only to apply to the case where the true owner of the estate was an infant. The language is general, and there is, as far as I know, no reason why the acts of a *de facto* manager should be valid when they are done on behalf of an infant, and invalid when they are done on behalf of a person who is *sui juris*. The manager who is not so *de jure* is, after all, no more than a person in possession under a supposed title, and I take the observations which I have above quoted to be in spirit and in language generally applicable.

The next case is the well-known one of *Bukshali Sohan Chunder Mitter*, Marshall, 614. There, during the lifetime of the plaintiff, and after the death of his father Juggomohun, a creditor of the father sued the plaintiff's mother Shekhar, widow of Juggomohun, and recovered a decree. Under the decree a portion of the estate of Juggomohun was sold to the plaintiff. The plaintiff brought the suit to recover this property, alleging

dow's interest, if she had any, passed by the sale. There were
 ally here two questions for consideration: first, what was in
 ld, the widow's interest only or that of Juggomohun; and,
 ly, whether, even if it were intended to sell the interest of
 ohun, the proceedings in the suit were effectual for the
 ? It is with the latter point only that we are concerned
 Sir BARNES PEACOCK disposed of it in these words: "If
 es who went to that auction had referred to the decree
 ld have found that the debt for which the sale was to take
 as not the widow's but Juggomohun's, and that the pro-
 be sold under the decree was not the widow's but Juggo-
 because Juggomohun was really the debtor, and the
 as sued merely in her representative character;" and he
 as to section 203 of Act VIII of 1859, as supporting that
 the law. It is clear to me, therefore, that Sir BARNES PEA-
 ought that a proceeding against the widow as representative
 asband may be an effectual proceeding against the hus-
 state, notwithstanding that the widow is not the heir to
 of her husband. A passage from another report (Special
 R., 119) of the same case has been relied on as showing
 his case the son was, in fact, a party to the suit, and that
 her appeared not as defendant, but as his guardian.
 y say that if it were so, it was overlooked by Sir BARNES
 as well as by the defendant himself, who expressly said in
 that the suit was brought against the widow (see the
 of the case by Sir BARNES PEACOCK). Any how I think
 as PEACOCK's judgment proceeds upon the assump-
 the mother was a party to the suit, and that the
 got.

ext case is reported in 5 Wyman, 27. There A, a
 an, died, leaving two sons, B (supposed to be ille-
 and C, and also a widow D. D died and then the
 D sued C and some other persons, not including B,
 the dower due to D. In the first instance a decree
 against the estate. This was subsequently modified,
 ee was made directing some of the defendants to pay
 , not out of the estate generally, but out of certain
 the deceased which had come to their hands subse-

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quently. B proved his legitimacy and got into possession part of the property of the deceased, and the heirs of sought to execute their decree, as modified, against the of the deceased in the possession of B. This Court (K. GLOVER, J.J.) said that, if the original decree had remained amended, the plaintiff would undoubtedly have been allowed to follow the estate which under that decree was charged with payment of the dower of D in whosoever's hands the might be. But under the modified decree certain parties were named, and amongst whom the name of B did not appear made liable to satisfy the decree, and the estate of the plaintiff was not made liable.

The next case is that reported in a note in 14 W. There certain creditors of the ancestor brought a suit against the person who alleged himself to be the heir, and who was then in possession of the estate, and they obtained a decree against him by which it was ordered that the property of the ancestor should be sold in satisfaction of the debt. In this suit was brought proceedings had been already commenced by one Rajkishen Singh, who claimed to be the true heir, to recover the estate, and before the decree of the court was executed the property had actually passed into the hands of Rajkishen. The matter was twice before the High Court. On the first occasion the Court thought that the decree had made the estate liable for the debt, and ordered the estate in the hands of the plaintiff to be sold under it. But no sale took place, and in a second regular suit Rajkishen Singh succeeded in setting this aside, and in obtaining a declaration that the estate was not bound by the decree.

The next case is that before BAYLEY and PAUL, reported at p. 448 of 14 W. R. There, as is very frequently the case, the parties who had obtained a certificate under Act 1860 authorizing them to collect debts due to the deceased, under colour of that certificate, obtained possession of the estate. A creditor of the deceased sued the parties who so obtained possession, got a decree, and sold a portion of the estate to satisfy it. The plaintiff then brought a suit against one of the parties who had subsequently established her right to the estate and got into possession. The suit was dismissed.

Courts below, and this Court upheld the decision in appeal. I may observe that the learned Judges base judgment upon the two cases I have last quoted; but great deference neither of those two cases are in point, as from the statement I have given. The case in Wyman's shows clearly that the learned Judges who decided it that a suit against the party actually in possession, in a decree was given against the estate, would bind the estate into whosoever hands the estate might come. In the case the creditors in the course of their proceedings were that they were suing a party who was a stranger to the estate, and who was no longer in possession of it, but they nevertheless thought fit to proceed.

Next case is that reported in 10 B. L. R., 294, a decision of the Council. That was a very peculiar case. A creditor sued a son and his mother for a debt of the minor's father. The fact of the minor was that he had been adopted into another family and consequently the creditor got a decree against the son only, it being declared that the son was not liable, and the debt was to be paid out of the estate of the deceased. Subsequently the creditor established in another proceeding that the son was really the heir of his natural father and had not been adopted; and he then proceeded to execute his decree against the estate. It was held that the interest of the son was not affected by the sale. The decision is not perhaps strictly in point, but is valuable for the present purpose in consequence of the Council having expressed their entire concurrence in the principle laid down by PEACOCK, C.J., in the case of *Isser Chunder vs. Bukshali*.

Next case is in 22 W. R., p. 57, also a decision of the Council. There one Mudden Thakoor purchased in execution the property obtained against two persons a property belonging to a family. The family was governed by the Mitacshara Law, and of the two persons had, when the sale took place, an infant son; the other had no son at the time, but one was born afterwards. The question was, whether the interest of the son who was born when the proceedings took place passed by the sale. The Council say:—

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"It appears that Mudden Mohun Thakoor purchased a property under an execution of a decree against the two fathers. It was found that a suit had been brought against the two fathers in a Court of Justice had given a decree against them in favour of a creditor; that the Court had given an order for the property to be put up for sale under the execution; and therefore it appears to their Lordships that he was perfectly within the principle of the case which has already been decided in 9th Moore's Indian Appeal cases, in purchasing the property and paying the purchase money *bonâ fide* for the purchase of the estate;" and further on it is said, "a purchaser under an execution is surely not bound to go back beyond the decree to see whether the Court was right in giving the decree, or having put up the property for sale under an execution. It has already been shown that, if the decree was a proper decree in the interest of the sons, as well as the interest of the father in the property, although it was ancestral, was liable for the payment of the father's debts. The purchaser under an execution, it appears to their Lordships, was not bound to go back than to see that there was a decree against the defendants, gentlemen, that the property was property liable to the execution if the decree had been given properly against the father, having inquired into that, and having *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for the property, the plaintiff is not entitled to set aside and to set aside all that has been done under the execution, and recover back the estate from the defendant."

This appears to me a very important decision, and it is quoted in the argument. It is to be observed that the property which the property was sold in this case was wrongly sold, that the infant son was not a party thereto. It is no suit to recover a debt from the family by a sale of the property could be rightly framed in which he was not a party. This appears from a later decision of the Privy Council in 1 C. L. R., 49—*Deen Dyal Lal vs. Jagdeep Narain Singh*.

The next case is reported in 24 W. R., 385. The defendant died leaving three sons. After his death two of them were his representatives for a debt which he had incurred: a

ed, and property belonging to the ancestor was seized and execution of that decree. The son who had not been sued brought a suit against the execution purchasers to recover property sold, alleging that his share did not pass by the execution. The parties were Hindoos, and there is not, as far as we are aware, any special rule in the Hindoo law analogous to the Mahomedan law which enables some of the heirs to recover the estate. The suit was, therefore, not rightly framed. The learned Judges, however, having first expressed their opinion that the decree was intended, not as a personal decree against the defendant, but as a decree for the debt of the ancestor to be satisfied out of the ancestor's estate, went on to say that this being so, they thought that *prima facie* they ought to hold that what was sold was the property of the ancestor, including the share of the plaintiff. "It is true," they say, "that the plaintiff, not having been made defendant in that case, is not precluded from showing that if he can do so, that what was understood by the bidders to have been sold was not the whole of the rights and interests of the ancestor, but only the right, title and interest of the two sons who were made defendants; and also the plaintiff can show that the decree was a defective decree, and that he, not having been made a defendant in that action, had no opportunity to show that the plaintiff in fact was not entitled to the decree which was passed. But it is for the plaintiff to show these facts which he must allege and prove, and in this case he has not done so, and we find that any such allegations were made." We are all the cases to which I think it necessary to refer, and being the authorities from which I have to derive the law on this subject, let us now see what are the grounds on which the plaintiff seeks to recover this property. He alleges that he has purchased the interests of Sudderennis; neither he nor his father has ever been in possession, and he can only, therefore, sue as representative of Buzlar Rohim. This he does by stating in the 6th paragraph of the plaint that she, as the heir's of Buzlar Rohim, was entitled to a six-annas share of the property sold to the appellant; that such six annas share did not pass by the sale in execution; and that notwithstanding the sale in execution it remained vested in her. There is no allegation of fraud or mismanagement, or that the debt

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for which the property was sold was not due. The plaintiff's claim proceeds upon the view that the existence of the debt to the Land Mortgage Bank, and the proceedings by which the debt have been satisfied, are no impediment whatever to his immediate and unconditional recovery of Sudderrenissa's share of the property.

Upon a consideration of all the cases which I have referred to I cannot take this view of the plaintiff's position. I think the cases above cited, upon the whole, show that the country proceedings to recover a debt due by the ancestor against a person who is not the true or sole heir, may, nevertheless, under some circumstances, bind the estate; and if it can be admitted, it is evident that the broad and general principle upon which the plaintiff seeks to recover in this suit cannot be maintained. It is not enough in this case to say Sudderrenissa was an heiress of the deceased, and that she was no party to the suit in the 24-Pergunnahs in which the property was sold. I must go further and see whether, that being a proceeding, the simple result of which was the property of the deceased being sold and applied in payment of his debts, that sale does not bind quite as fully as if the suit had been unimpeachable as to the regularity, or as if she had been a party thereto. In my opinion, considering that the parties sued were in possession of the property which was ultimately sold, that that property was mortgaged by the ancestor for this very debt, and that the debt was properly and duly applied to the payment of the debt in which it was mortgaged, Sudderrenissa, as one of the representatives, was bound by those proceedings just as much as the representatives who were actually parties thereto. If I am in this I think I am keeping well within the authorities which are binding upon this Bench, some of which appear to me to be upon grounds even somewhat more general. It is true that in most of the cases I have referred to are cases in which the Hindu law and not the Mahomedan law had to be applied; but to me that this, if a difference at all, is in favour of the plaintiff. The Mahomedan law lays down more clearly than the Hindu law the liability of the estate as distinguished from the personal liability of the individual heirs. I do not for

under Hindoo law the estate is not liable, but in the the Mahomedan law the liability of the estate is more expressed.

I think that this view of the law is supported by section the former Code of Procedure (section 252 of the new That section provides :—" If the decree be against a party representative of the deceased person, and such decree be to be paid out of the property of the deceased person, be executed by the attachment and sale of any such or if no such property can be found, and the defendant satisfy the Court that he has duly applied such property ceased as shall be proved to have come into his possession, the decree may be executed against the defendant to the the property not duly applied by him, in the same as if the decree had been against the defendant personally. BARNES PEACOCK thought that section applicable to a a widow, who was not the heir, was sued as the representative of her husband. This shows that a person may be a representative within the meaning of this section, so as to make the decree effectual for the purpose therein stated, although the person is not the heir.

I said that the decree of the District Judge of the 24-Perambur and the order of this Court directing the property to be sold was both irregular and wrong. No doubt the District Judge of Perambur had no power to grant a decree directing the property in Calcutta; but if that part of the order were set aside, and the decree stood as a decree for the debt alone against the representatives, this decree would be properly executed by the District Judge of Calcutta; and having regard to the provisions of section 203 of the Code of Civil Procedure, the District Judge of Calcutta would be right in ordering that the decree be executed against the property of the deceased in Calcutta. If, therefore, there has been any error in attempting to enforce a decree against Calcutta property by a mofussil decree, that error is immaterial, for there being no mesne incumbrances the property would stand in just as good a position if there were no error at all. Indeed I go further. The cases I have quoted lead me to show that if the parties in possession had,

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without the consent of Sudderrenissa, by a voluntary
 ment sold the estate to the appellant, in order to pa
 mortgage debt, that sale would not have been void in
 Sudderrenissa's share, provided that the purchaser was
 notice of Sudderrenissa's claim, or that there was no re
 means of getting her concurrence.

It may be said that the result of this judgment is t
 the appellant the benefit of the Mahomedan law, and to
 him from its express restrictions; but I do not think
 is really so. I have said that the District Judge wa
 in giving a decree by consent, but I do not think it fol
 necessary consequence that that error vitiated the
 against a purchaser in execution of the decree. The
 of the arrangement consented to was to substitute for th
 which was irresistible, an arrangement for postponing
 which the parties then in possession of the estate thou
 advantageous to those interested, and which is not show
 been otherwise. It may be that on this ground Sa
 could have come in and insisted on setting aside the de
 it does not follow that because Sudderrenissa might ha
 on setting aside the decree that the sale is as against
 proceeding; nor if the decree were set aside would it
 follow that the appellant's purchase under it would
 avoided also. There are many cases in which, when
 set aside, a sale in execution of it will still hold good—(A.
 C., 58; id., 84, and 8 W. R., 300).

But I need not consider what would be the effect
 the decree aside; or whether the respondent has any
 than that which he has set up in the present case.
 to decide no more than under the reference we are
 bound to decide, and I, therefore, answer the quest
 terms in which it is put to us, that the property
 this suit relates did, under the circumstances stated in
 pass to the appellant.

AINSLIE, J. :—

I am of the same opinion.

[CIVIL APPELLATE JURISDICTION.]

ASEE BEGUM ONE OF THE DEFENDANTS ;

AND

ROOP KOOWER PLAINTIFF.

1878
March 11.

—Guardian de facto—Act XL of 1858, section 18—Contract Act (X. of 1872) sections 65, 68-70—Maxims of Equity—Representatives—Acts of deceased.

In a suit for debt, which was brought against the representative of a debtor, i.e., his widow—as widow and guardian of her minor daughter—a decree was passed directing that the property of the deceased should be attached and sold in execution for the purpose of realizing the amount of the decree. To prevent this the widow borrowed a sum of money, on her own behalf and as guardian of her minor daughter, hypothecating her property belonging to herself and her daughter. It was proved that the widow was the sole manager of the property from the death of her husband. *Held*, however, that the hypothecation was invalid as against the daughter and did not bind her estate.

Since the passing of Act XL of 1858, no greater powers can be exercised by a *de facto* guardian who has not legally completed his right to manage a minor's estate than can be exercised by a guardian duly appointed under that Act.

—Court of Wards on behalf of Kisho Pershad Singh vs. Kupplman 19 W. R., 164; 10 B. L. R., 364; *Surut Okunder Chatterjee vs. Kissen Mookerjee*, 24 W. R., 46; 15 B. L. R., 350; and *Debi Dutt vs. Suboola Bibee*, 1 L. R., 2 Cal., 283, cited and followed.

The position of a person contesting his guardian's completed acts and asking the aid of the Court to get his property back from the holder at the time being, is different from that of one who resists the giving of property to that which is on its face opposed to a specific provision of law. The maxim:—"He that seeks equity must do equity," applies to the present case. *Hanooman Pershad Panday's case*, 6 Moore's Ind. Appeals, distinguished.

The clause in section 18 of Act XL of 1858, namely, "every person whom a certificate shall have been granted under the provisions of the Act, may exercise the same powers in the management of the estate which might have been exercised by the proprietor if not a minor," means that the properties as come to the hands of the guardian may be dealt with by the minor, if of age, might deal with them, subject to the restrictions laid further on; and that such liabilities to or by the estate as may

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be outstanding at the time, are within the power of the guardian to charge the estate with a new debt without sanction of the Court is clearly restrained by the last clause of the section.

If a contract is to be made by one to bind another who can himself, it can only be under some express authority of law; authority is not to be found in section 18, Act XL of 1858.

Sections 65, 68-70, of the Indian Contract Act (IX of 1872)

**REGULAR APPEAL** from a decree passed by the Sub Judge of Gya.

In 1858 Aga Wajid Ali Khan died indebted to one Duli Chand who subsequently brought four suits for the money against Musamat Umda Begum, the mother of Aga Wajid Ali Khan, and Musamat Umda Khanum "for self and as heiress of Aga Wajid Ali Khan, deceased, and mother of Musamat Abbasee Begum." In this suit Duli Chand got a decree which directed that the judgment-debt should be realised out of the estate of Aga Wajid Ali Khan, deceased, in the hands of the defendants." These decrees were dated the 12th of August 1862.

On the 19th of September 1868, Musamat Umda Khanum borrowed from Musamat Raj Roop Koower Rs. 20,000 for the purpose of paying off Duli Chand's decrees and Government debts then due; and as collateral security she, on her own behalf and as guardian of her daughter, hypothecated certain land. The present suit was brought on the 16th of August 1878 on this security. Plaintiff got a decree in the lower Court against both defendants, and Musamat Abbasee Begum appealed.

*Amir Ali*, for Appellant. *Mr. R. E. Twidale* with *Baboo Jugdanund Mookerjee*, *Baboo Mohesh Chunder*, *Baboo Moonashee Mahomed Yusoof*, and *Baboo Amarendranath*, for Respondents.

The judgment of the Court (1) was delivered by

**AINSLIE, J.** *AINSLIE, J.:*—

This suit is brought by the plaintiff against Musamat Khanum and her daughter Musamat Abbasee Begum.

(1) *AINSLIE and McDONELL, J.J.*

Rs. 17,018-10-9 on a bond dated 19th September 1868 for Rs. 10,000, bearing interest at 15 per cent. per annum which has accumulated until it now amounts to Rs. 17,018-10-9; such bond having been executed by the first defendant, during the minority of her daughter, on her own account and as guardian of her daughter.

The bond contains a pledge of a five-sixth share of thirty-two shares, formerly belonging to Aga Wajid Ali Khan, the husband of Umda Khanum and father of Abbasee Begum, being the share which, under the Mahomedan law of inheritance, has descended to the two defendants jointly, after deducting a one-sixth share by his mother Umda Begum. The bond recites that the debts were due to Duli Chand under four decrees, all bearing date the 12th May of 1862, in respect of debts due by Aga Wajid Ali; that the executant and her daughter were liable for the amount in proportion to their shares in the estate; and that the said decrees had been put in force, and the property of the executant had been attached and advertised for sale. The amount due to Duli Chand is not stated. It further recites that there were other pressing necessities such as payment of Government revenue and sundry other rents, and defraying the expenses of suits instituted for recovery of arrears due from defaulters, and goes on to state that the said decrees and charges had been paid out of the money borrowed. It also contains an assignment of Rs. 733 per annum, from 1266 to 1285, out of Rs. 1,400 the amount payable by one Himmutram in respect of a lease of Mouzah Kharan, in part payment of the amount of the interest.

In answer of the appealing defendant, Mussamut Abbasee Begum, it is stated that at the date of the bond she was already married; that her husband, being then of full age, was her proper and legal guardian; that her mother never obtained legal authority to act as guardian, or the sanction of the Civil Court to the mortgage; that she has derived no benefit from the transaction; that the contents in the bond are false; and that her father's estate was worth a clear annual income of Rs. 5,000.

The Subordinate Judge gave one judgment in this and three judgments in which about Rs. 36,000 was claimed under three bonds of 1869, 1870 and 1871 respectively. In these last

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he absolved Abbasee Begum, holding Umda Khanum liable. In this suit he held that, although by the Mahomedan law, a mother is not the guardian of the estate of a minor yet as a matter of fact Umda Khanum had acted as guardian of her daughter from the death of Wajid Ali in 1868. Abbasee was an infant of a few months old up to the time she attained her majority, and that during this period of years neither Abbasee's husband nor any one else ever questioned her authority, and that as late as the 16th December 1878 Abbasee, through her pleader, alleged in the Magistrate's Court that she was still a minor, and that her property was under the management of her mother. He also found that at the time of the bond there were debts chargeable to the estate of Umda Khan which Umda had to pay, and that there were also marriage expenses of Abbasee, and the expenses of unavoidable debts to be defrayed. In the course of his judgment the Subordinate Judge refers to a proceeding taken for the purpose of settling the estate of Abbasee Begum under the charge of the Court of Wards, which he says was abandoned, the management of the estate being left to the mother. This paper is not of much importance, as it was dated nine days before Act XL of 1858 was passed. The fact that the Court of Wards did not then choose to interfere did not really alter the position of the mother as a guardian of the estate. She has abstained from taking out a certificate under Act XL of 1858.

Abbasee Begum appeals against the decree of the Subordinate Judge so far as it affects her, and denies her mother's right to mortgage money on mortgage of the estate at any time, and more especially after her own marriage; and contends that it is evident from the facts appearing on the record, that she derived no benefit from her mother's acts, but, on the contrary, will be seriously injured if they are allowed to have effect against her.

The right, under the Mahomedan law, of a mother to exercise guardianship of her minor daughter was discussed at the time of this appeal, but into this question we need not enter. We quite concur with the Subordinate Judge in holding that it is proved that, as a matter of fact, no other person besides Umda Khanum did, up to 1868 and for years after, pretend

management of Abbases Begum's property as her unnecessary to go to the Mahomedan law to ascertain how anger was justified in dealing with Umda Khanum in of her daughter's interests. Act XL of 1858 had been or nearly ten years when this transaction occurred, and of a guardian *de facto* to manage property of his ward determined with reference to this Act.

question has been settled by several decisions in which it ruled that, since the passing of Act XL of 1858, no powers can be exercised by a *de facto* guardian who has completed his right to manage a minor's estate than exercised by a guardian duly appointed under that Act. *Court of Wards* on behalf of *Kisho Pershad Singh vs. Singh*, 19 W. R., 164, 10 B. L. R., 364; *Surat Chatterjee vs. Raj Kissen Mookerjee*, 24 W. R., 46, R., 350; and *Debi Dutt Sahu vs. Suboola Bibee*, 2 Cal., 283. The first was a case under the Lunacy Act of 1858, but the words of section 14 of that Act are the same as those of section 18 of Act XL of 1858. This case was relied upon by the Court in the second

of 1868 by the mother, so far as it purports to create of the daughter's share in the estate of Aga Wajid Ali. The case of *Hunooman Pershad Panday vs. Munraj Moore's Indian Appeal*, 393, and other cases were relied upon. That case was decided on appeal to Her Majesty's Council before the passing of the Act of 1858, and, other cases of completed alienations to be found in the same Act, was a suit by a minor after attaining majority to set aside the acts of his guardian by which his (the minor's) property had been charged with a mortgage and given over into the hands of the mortgagee. The position of the person contesting the guardian's completed acts, and asking the aid of the Court to restore the property back from the holder for the time being, is the same as that of one who resists the giving effect to that which is on its face opposed to a specific provision of law. When the property has actually passed and cannot be recovered without

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invoking the aid of the Court, the plaintiff puts himself hands of the Court, and must take his remedy on such terms as the Court may impose, on a consideration of the equities in the case. But if we allow the plaintiff in this case to her mortgage, as on a valid mortgage of the minor's share, shall in effect declare that section 18 of Act XL of 1858 as it limits a guardian's power, is inoperative, and may be ignored by any one who chooses to bargain for the mortgage in contravention of its provisions.

But it is said that if it be held that the bond is invalid as it creates a mortgage of the minor's share of the property named therein, it can be treated as a simple bond for money, and that, inasmuch as that money was lent to and the mortgage was taken by Abbasee Begum, she is liable to be sued. Assuming that the conditions respecting the mortgage were struck out, the case of the plaintiff would still fail. The defendant contends that, under the words of section 18 of Act XL of 1858, "Every person to whom a certificate shall have been granted under the provisions of this Act, may exercise the same in the management of the estate as might have been exercised by the proprietor if not a minor"—the mother was empowered to borrow money for the benefit of the estate. It may be conceded for the purposes of this appeal that the mother, not duly appointed under the Act, could legally exercise the powers which would have been conferred on her by a guardian under the Act. It does not appear to us that these words give the mother any power to contract debts on behalf of the minor.

The words must be read with the context, and, so read, evidently mean that such properties as come to the hands of a guardian may be dealt with as the minor, if of age, may deal with them, subject to the restrictions declared in the Act, and that such liabilities to or by the estate as may be outstanding at the time, are within the power of the guardian. But the power to charge the estate with a new debt without sanction of the Court, is clearly restrained by the last clause of the section. Now, if there is no power to charge the estate, how could the mother contract for the daughter?

by a sum of money on a given day, so as to make the one on which the plaintiff can sue the daughter. Un-
the daughter's contract no suit will lie against her on

assume that the signature on the bond is sufficient to daughter, if it was in the power of the mother to bind that it is a bond to which the daughter's signature has red by her mother. But the daughter was a child of ten age and was incompetent to contract. See Contract Act, 172, section 11. This is not new law. The Act, in a it, only reduces to the form of a single enactment rules acknowledged: it purports to be an Act to define and amend parts of the law relating to contracts, and, save as so it does not alter pre-existing rules. In fact the res- as cited and relied on this Act.

is no authority that I know of for saying that one per- borrow money in the name of or on behalf of another a bond in that others name, when that other is a per- wholly incompetent to contract for himself. If a con- to be made by one to bind another who cannot self, it can only be under some express authority and such authority is not to be found in section XL of 1858. We were referred to section 65 Contract Act; but although the expression "any person," ed, is general, it is limited by the words "under such or contract," so as to apply to those who derive ad- parties, directly from the contract, and not to every way, however remotely, have gained some advantage in use of a contract entered into by others. The fourth in which this section occurs, deals with rights of parties act; and there is a distinct chapter, the fifth, dealing and liabilities of persons not directly contracting which arise under certain circumstances, and resemble the liabilities created by the contract.

med pleader for the respondent called our attention to 68 to 70 of this chapter. As to section 68, it is only observe that it deals with a specific class of claims use of necessities of life supplied to one incapable of

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contracting. Section 69 cannot possibly apply, as there community of interest in the payment of Wajid Ali debts between the plaintiff and Abbasee Begum. Section is equally inapplicable. Nothing was delivered to the therefore, if this section can apply at all, it must be of the words "where a person lawfully does anything other." The contention may be thus stated that plaintiff fully delivered money to Umda Khanum for the use of Abbasee Begum who enjoyed the benefit of such delivery, and consequently she (Abbasee) is bound to compensate the plaintiff. I think this statement is not sufficient to bring the case under the section. It is not necessary that the person claiming compensation should have done an act with his own hands. Umda Khanum here was not the plaintiff's agent to whom money lent to the benefit of the minor, nor did she attempt to see that the money really went to the use of the minor. She did nothing *for the minor*, as required in the section. She simply put Umda Khanum into a position in which, minded, she, Umda, might apply the money to the benefit of the minor.

Whether Abbasee is indebted to Umda in respect of the Rs. 20,000, taken by Umda from the plaintiff, is not known until the accounts of Umda's management and daughter's estate are taken. It appears that Umda Khanum recovered large sums, Rs. 25,000 or more, under decrees against Duli Chand, and there undoubtedly was a substantial sum come from the estate of Wajid Ali Khan to be accounted for. This account cannot be taken in this suit at the instance of the lender of the Rs. 20,000, and her remedy must be confined to a decree against the person with whom she entered into the transaction. The appeal must, therefore, be allowed with costs. So much of the decree as affects Abbasee Begum is reversed. The suit, as against her, is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

N NATH BHADOORY PLAINTIFF;

AND

KANT LAHOREE DEFENDANT.

1878
March 15.*of Judgment—Error in granting Review—Fresh Evidence—Reversal of decree on a technical ground—Error affecting the merits.*

The Moonsiff dismissed a suit. Afterwards he issued a rule calling upon the defendant to show cause why a review of judgment should not be granted. The defendant showed cause, but his objections were overruled; the review was granted; both plaintiff and defendant adduced new evidence, and a decree was given for the plaintiff. On appeal, the subordinate Judge reversed this decision on the ground relied upon by the defendant in showing cause in the lower Court, namely, that the plaintiff had not established that with due diligence he could not have brought forward in the original trial the evidence upon which his application for review was based. *Held*, in special appeal, that the fact of the defendant having adduced fresh evidence in the Court below did not debar him from objecting before the Subordinate Judge that the review was wrongly granted, because the order admitting it was final.

The lower Appellate Court is not justified in reversing a decision of the Court of First Instance for a technical error, unless that error has affected the decision of the case on the merits.

The best test to ascertain whether an erroneous interlocutory order affected the ultimate decision on the merits, is to see whether the court would have come to the same decision had the erroneous order been passed.

SPECIAL APPEAL from a decree passed by the Subordinate Court of Furreedpore, reversing that of the Moonsiff of Goalundo.

For *Rajendro Nath Bose*, for Appellant.

For *Turini Kant Bhattacharje*, for Respondent.

The facts of the case sufficiently appear from the decision of the High Court (1), which is as follows:

In this case the Moonsiff's judgment was at first in favour of the defendants. The plaintiff made an application for review of

(1) *MITTER and PRINSEP, J.J.*

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that judgment on the ground of discovery of new evidence application was granted, and the Moonsiff, upon a consid- of the new evidence, as well as that already adduced by the tiff in the original trial of the suit, came to the conclusi his first judgment was erroneous. He accordingly dec plaintiff's claim. On appeal, the Subordinate Judge has the Moonsiff's decree on the ground that the plaintiff established that, with due diligence, he could not adduce evidence upon which his application for review was based.

The first objection urged before us is, that the defendant himself also adduced fresh evidence in the Moonsiff's O rebut the evidence adduced by the plaintiff, after the ap for review was granted, the Subordinate Judge ought not reversed the Moonsiff's decree upon the ground mention But in our opinion this objection ought not to prevail. Be find that the defendant, being called upon to show cause application for review should not be granted, strenuously it upon the very ground which was ultimately found Subordinate Judge to be a valid one. But notwithstanding objection the Moonsiff allowed the plaintiff to add evidence; the defendant was therefore obliged to sub Court's order at that stage of the case. The order adm review was final, and at that stage of the case the defendant could not bring up the matter of his complaint the Court of Appeal. Under these circumstances, we o that the defendant must be considered to have waived tion to the plaintiff's adducing new evidence upon his ap for review merely because he, the defendant, was comp withstanding his objection to adduce evidence in answe adduced by the plaintiff. We therefore overrule this obj special appeal.

The next objection taken before us is, that the Su Judge should not have reversed the Moonsiff's decre technical ground without determining whether the ar plained of affected the merits of the decision. It has b before us that the Subordinate Judge should have de appeal, excluding the new evidence adduced by the po the application for review was granted. There is no d

order of the Moonsiff granting the review is erroneous and warranted by the provisions of the Procedure Code. The question is whether that error has affected the merits of the decision, because if it has not affected the merits of the decision, the Court of Appeal was not right in reversing the Moonsiff's decree.

The best test to ascertain whether an erroneous interlocutory order has affected the merits of the ultimate decision or not, is to suppose whether the Court would have come to the same decision if the erroneous order had not been passed, that is to say, if the decision of the Court would have been just the same, even if the error complained of had not been committed. Applying that test, we cannot say in this case that the order of the Moonsiff granting the plaintiff's application for review has not affected the merits of the decision. The error complained of has in fact produced a decision contrary to that passed by the Moonsiff at the original trial of the suit. We, therefore, cannot say that the decision of the Moonsiff would have been just the same whether the order granting the review was passed or not. On the other hand, the effect of the erroneous order has been to produce a contrary decision. This objection therefore also fails. The special appeal is dismissed with costs.

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SHIB PROKASH SINGH JUDGMENT-DEBTOR
AND
SIRDAR DOYAL SINGH PURCHASER.

Sale in Execution of Decree—Irregularity—Proof of Substantial Injury—Setting aside Sale—Act VIII of 1859, section 249.

In execution of a decree, a sale proclamation was issued declaring that the right, title and interest of the judgment-debtor in certain property should be sold on a certain day. Before the sale a portion of the property was released from attachment at the instance of a third party. No fresh proclamation was issued, but on the day of the sale the release was made known to the assembled bidders. The remainder of the property was sold. *Held*, that the omission to issue a fresh proclamation was a material irregularity which, in the absence of proof of substantial injury, would induce the Court to set aside the sale at the instance of the judgment-debtor.

The judgment-debtor is entitled to have a proclamation issued which shall state accurately the property to be sold, and which shall be published thirty days before the sale.

REGULAR APPEAL from an order passed by the District Judge of Shahabad.

Baboo Aukhil Chunder Sen, for Appellant.

Baboo Anund Gopal Paulit, for Respondent.

The facts of the case are sufficiently set forth in the judgment of the High Court (1) which is as follows:—

It appears in this case that the property of the appellant, which is the judgment-debtor, was put up for sale in 1877, under a sale proclamation which bore date the 11th of January of that year and was published on the 27th of the same month, and fixed the 1st of March 1877 as the day for sale. The proclamation directed the property to be sold as a 2 annas 8 pie share in a certain village, the jumma of which was 1,269 rupees, 5 annas and 4 pies.

(1) WHITE and MITTAL, J.J.

11th of January and the 5th of March a portion, consisting of kalums of the property advertised to be sold, was released in attachment upon the application of one Nursingh Roy. The effect of the release of this portion was, that the description of property which was advertised to be sold was no longer an accurate description.

Now section 249 of the Code, in prescribing what the proclamation is to contain, makes express mention of the property to be sold, and there can be no doubt that that particular is one of the points of great importance. In a case where, as here, a variation had taken place between the property advertised to be sold and the property actually sold in consequence of the release obtained by Nursingh Roy, it was necessary and proper that a fresh proclamation should be issued in order to comply with the requirements of the section to which I have referred. No such fresh proclamation, however, was issued; but on the day of sale those who had assembled for the purpose of bidding for the property were informed at the time and place of sale that a portion of the advertised property had been released, and that the sale would therefore only extend to 2 annas 8 pie share of the talook, less that portion. It is clear that this was not a compliance with the Code, and that some injury may have resulted to the appellant from the adoption of such a course. The judgment-debtor is entitled to a fresh proclamation issue, which shall state accurately the property to be sold, and which is published thirty days before the sale.

The method adopted deprived him of the benefit of the thirty days advertisement, and is open to the further objection that the bidding purchasers were left in the dark as to the extent of the portion which Nursingh Roy had procured to be released, and as to how much it reduced the value of the 2 annas 8 pie share of the talook which was advertised for sale. That the proceeding, under the circumstances, to sell the appellant's property, under the proclamation of the 11th January 1877, amounted to a material irregularity, we think there can be no doubt. The way in which the coordinate Judge has dealt with the objection is this. He

"No rule has been pointed out and urged that in a case like this the writ of attachment and sale proclamation should be issued and published (anew) under that rule. It being so, to

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call such an omission an irregularity is altogether improper." The objection is not pointed to the omission a fresh writ of attachment, but to the omission to issue proclamation. A reference to section 249 of the Code have satisfied the Subordinate Judge that a fresh process was in strictness required, inasmuch as the property sold did not correspond with that which was proclaimed sold.

The irregularity being in our opinion material, we have to determine whether the judgment-debtor has proved he has sustained substantial injury by reason of that irregularity. We can easily suppose that he may have done so, and irregularity of such a sort that very little evidence would satisfy the Court on the point. It is necessary, however, for him to show some evidence of substantial injury, but this he is unable to do upon the present application, because he cannot show the value of the 12 kalums which have been deducted from the 2 annas 8 pie share of the talook.

The Court below does not appear to have examined the evidence with a view to this point, nor indeed did the objection properly arise there, because it held that the objection on the score of irregularity failed, in which case, of course, it was unnecessary to consider whether substantial injury had or had not been suffered by the judgment-debtor.

This question now becomes material, and we think, in considering the course which the application took in the Court below, the judgment-debtor should have an opportunity of stating his case on this part of his case. We shall, therefore, with these remarks, remand the case to the Subordinate Judge, and direct him to ascertain, from the evidence on the record and from any further evidence that may be adduced by the parties, whether the judgment-debtor has sustained injury by reason of the occurrence of the irregularity complained of. The appellant and respondent respectively, will have liberty to produce such further evidence as they may think fit. The costs of this appeal will abide the result of the remand.

[CRIMINAL REVISIONAL JURISDICTION.]

IN MATTER OF SUFFURUDEEN . . . 1st PARTY;
AND
HIM 2ND PARTY.

1878
April 30.
—

50, *Code of Criminal Procedure—Trial by Bench of Magistrates—
Jurisdiction—Section 530.*

Applying the definition of "trial" to section 50, Code of Criminal Procedure, under which a Bench may be empowered "to try such cases such classes of cases, only and within such limits as the Government direct," a Bench is competent only to hold trials for offences and not deal with miscellaneous matters such as those under section 530.

referred by the Sessions Judge of Backergunge to the Court, as a Court of Revision, that an order of a Bench of Magistrates under section 530, Code of Criminal Procedure, directing a certain party to be retained in possession of certain property be set aside as contrary to law.

Following order was passed by the High Court (1) :—

are of opinion that it was not competent to a Bench of Magistrates to deal with a case under section 530. A Bench empowered under section 50 "to try such cases or such classes of cases only and within such limits as the Government direct." The definition of the term "trial" shows that it only applies to trials for offences, and not to miscellaneous matters such as those coming within section 530. So that in this case the law also the order passed was illegal. It is accordingly set aside.

(1) MARKBY and PRINSEP, J.J.

[CRIMINAL REVISIONAL JURISDICTION.]

1878
April 30.

IN THE MATTER OF SREEMUTTY RANEE } 1ST F
ANONDOMOYEE DEBEE }

AND

LUCHMUN PERSHAD GOGO AND OTHERS . 2ND F

Section 530, Code of Criminal Procedure—Death of one of the parties.

On the death of one of the persons concerned in a matter under section 530, Code of Criminal Procedure, just before those proceedings are terminated in favour of that person and another, though it is more regular for the Magistrate to postpone the proceedings and enable his representative or a party in his place, the proceedings are not necessarily bad since the death has prejudiced no one.

CASE referred by the Sessions Judge of Midnapore, for the orders of the Magistrate in a proceeding under section 530, Code of Criminal Procedure might be set aside as contrary to law by the High Court as a Court of Revision.

The Sessions Judge, in submitting the case, made the following remarks:—

“The case is one under section 530, Code of Criminal Procedure, concerning possession of a ferry; and the Deputy Magistrate of Tumlook decided in favour of the second party on January 12th 1878, Luchmun Pershad Gogo having died on the same day *idem*. I think that the Deputy Magistrate's order is to be set aside, because he knew one of the parties was then deceased.”

The following order was delivered by the High Court:

We see no reason for setting aside the Magistrate's order under section 530, because one of the two parties, in whom the order was passed, died just before the proceedings were terminated, for we observe that there was another in whose favour the order still remains; and though probably it would have been more regular had the Magistrate postponed the case to enable some representative of the deceased to appear, it could have prejudiced no one since the order was in favour of the deceased and another person.

(1) MARKBY and PRINSEP, J.J.

[CIVIL APPELLATE JURISDICTION.]

HEE PERSHAD SEN NEOGEE . . . PLAINTIFF;

1878
March 13.

AND

IR PAIKAR DEFENDANT.

*As—Calendar months—Act VIII (B.C.) of 1869—Failure of suit—
Relief first asked in Special Appeal.*

The word “months” in Act VIII (B.C.) of 1869, means English calendar months. [See Act V (B.C.) of 1867]

Where a plaintiff fails to make out a claim for enhanced rent, he is not entitled in Special Appeal to a decree for rent at the original rate.

REAL under the Letters Patent from a decree passed by Justice BIRCH.

It was one of a series of suits for arrears of rent for the year 1279 at enhanced rates pursuant to notice. The last day of the Bengali year 1279 corresponded with the 11th of April 1873. The suits were not instituted till the 12th of July 1873, when the Moonsiff dismissed them on the ground of limitation. He held that the word “months” in section 29, Act VIII (B.C.) of 1869, meant English calendar months, and cited, in support of his opinion, *Khurroo Mondul vs. Ram Loll*, 18 W. R., 403; of 1868; and Act V (B.C.) of 1867. On appeal, this was set aside, and the suits directed to be tried on the merits. The Plaintiff got a decree which was modified on appeal. He then specially appealed to the High Court when the final judgment was delivered by

J. :—

BIRCH, J.

In this case, and the cases which are analogous to it, the suit was at the first instance dismissed by the Moonsiff, and rightly so, upon the plea of limitation. The cases went up in appeal before the Subordinate Judge, who, misapprehending the law which governs suits of this nature, reversed the order of the Moonsiff and directed him to go into the cases upon the merits. The result has been unfortunate for the parties,

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inasmuch as they have been put to a good deal of expense trial of these cases, and upon their coming up here in appeal, the first objection which is raised is, that all the suits are barred.

Under section 29 of Act VIII of 1869 (B. C.) suit for recovery of rent at a higher rate than was payable in previous year, such rent having been enhanced after issue of decree under sections 13 and 14 of the Act, and the enhancement having been confirmed by any competent Court, must be instituted within three months from the end of the Bengali account of which such enhanced rent is claimed. It has been held in this Court more than once, and notably in the case reported in 23 Weekly Reporter, p. 275, and also in the case before Mr. Justice MACPHERSON and myself which is reported, but in which the point was fully argued, that the word "month" in this section means calendar months according to the English calendar. The last day of the Bengali year 1279 corresponding to our calendar the 11th of April 1873, and the suits must have been instituted on the 11th day of April. It was not instituted until the 12th of July, and therefore the suits which are before me in special appeal must be held to have been barred by limitation. The pleader for the respondents suggests that I should declare that so much of the judgment of the lower Appellate Court as fixes what the rates of rent should stand; but it is scarcely necessary for me to do so, the suits being barred, all the proceedings taken in the suits must become inoperative. The special appeals are dismissed with costs.

Plaintiff appealed under the Letters Patent.

Baboo Mohiny Mohun Roy, and Baboo Nulm Chandra Sen, for Appellant.

Baboo Bungshee Dhur Sen, for Respondent.

The judgment of the High Court (1) is as follows:

We think that in these cases we are concluded by the decision of the lower Court. As regards the point of limitation, it has been

(1) GARTH, C.J. and McDOWELL, J.

R. J., in 23 W. R., 275; *Lutchmiput Singh vs. Raj*
aree Dabee, that the "months" mentioned in Act VIII,
Calendar Months; and that decision has been con-
 sidered in another case, decided by MACPHERSON and BIRCH, *J.J.*
 during the time, therefore, within which these suits
 have been instituted as calendar months, they were
 too late. With regard to the second point, it has
 been contended, that although the plaintiff has failed in
 proving his claim to the enhanced rent, he is entitled
 to the last Court of Appeal to have a decree for rent, at
 the original rate. But this would obviously be most unfair.
 If the original rent had been demanded from the defendant,
 and if of the enhanced rent, there is no reason for sup-
 posing that it would not have been duly paid. If the defend-
 ant had pleaded payment or tender of the original rent, it
 would of course have been no answer whatever to the claim for
 enhanced rent. The observations of their Lordships in the
 Council in the case reported in 19 W. R., 41—*Gopee Kissen*
vs. Brindabun Chunder Sircar, entirely support this.
 The appeals are dismissed with costs.

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[CIVIL APPELLATE JURISDICTION.]

1878
April 25.

NEW BEERBHOOM COAL Co. PLAINTIFF

AND

BALARAM MAHATA AND OTHERS DEFENDANTS

Specific Performance—Contract to sell at a fair valuation—Uncertainty to ascertain price—Limitation—Act IX of 1871, Sch. II, cl. 1.

Where a contract is made to sell land at a fair valuation, and there is no difficulty in ascertaining what a fair valuation would be, the Court will take the usual means of ascertaining it and decree performance of the contract. But where the circumstances are such that the valuation of the land must be always to a great extent a matter of guesswork, and the Court have in consequence no means of ascertaining by the ordinary method what a fair valuation would be, specific performance of the contract will not be decreed.

Discussion as to limitation applicable to suits for specific performance.

REGULAR APPEAL from a decree passed by the Court of Session at East Burdwan.

This was a suit for specific performance of an agreement to execute a mocurarri pottah in respect of a certain mouza, the property of the defendants, a joint Hindu family, in pursuance of the terms of an agreement dated the 13th of September 1858.

The plaintiff stated that, on the date just mentioned, the defendants executed a mocurarri pottah of 51 bighas of waste land in favour of a Mr. Erskine, at an annual jumma of Rs. 100, which contained the following stipulation:—

“We will grant no pottah (in respect of land) within the aforesaid mouzah to any *Kutiwala* (factory person) besides ourselves; in other words, we will not give settlement and title to any one. If besides the land covered by the pottah we are in need of and take possession of additional land according to necessity, we will settle such land with you at a proper price. We will not raise any objection thereto. By payment of the aforesaid jumma to us, year after year, do you continue to possess and possess from generation to generation. To this

the deed of mourasi pottah of our own accord on receipt of the pottah in due form."

On the 26th of August 1874 the plaintiffs, who are the assignees of Mr. Erskine, having occasion to avail themselves of the above clause, took formal possession of the whole remainder of the lands referred to therein. They then demanded a pottah from the defendants, who at first evaded and but finally refused it. The defendants put in two statements denying in toto the allegations contained in the first, and stating that they had already leased the land to the plaintiffs claimed the pottah to the Bengal Coal

The judge found that the pottah of 1858 was authentic; that it had been regularly assigned to the plaintiffs; that, as the negotiations between the plaintiff and the defendants in 1875, two of the defendants, and after them a third, had intimated their approval of the terms then proposed to the entire Mahata brotherhood by the plaintiff, but that no covenant entered into on the part of the Mahata brotherhood; and he held that the suit was barred by limitation, as it had been brought within six years of the date of the pottah, namely, the 13th of September 1858, as required by Act VI., Sch. II., Art. 118.

The case was appealed to the High Court, by whose order the Bengal Coal Company was made a party respondent to the

Advocate-General,) and Phillips, for the Appellants.
Bell, and Stokoe, for the Respondents.

Following authorities were cited :—Fry on Specific Performance; *Milnes vs. Grey*, 14 Vesey., 400; *Keppel vs. Bailey*, 10 K., 517; *McLean vs. McKay*, L. R., 5 P. C., 327; *Ramgopal Narayan Singh vs. Ram Dutt Chowdhry*, L. R., 264; *Tulk vs. Moxhay*, 2 Phillips, 774; *Catt vs. Carr*, 4 Ch., 654; *Oxford vs. Provan*, L. R., 2 P. C., 485; *Wagner vs. Wagner*, 5 De G. & Sm. 485; 1 De G., M. & G., 429; *Gourlay vs. Duke of Somerset*, 19 Vesey., 429; *Specific Performance*; *Hamilton vs. Grant*, 3 Dow.,

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33, 42; *Wilks vs. Davis*, 3 Mer., 507; *Fickers vs. Ficker*, 4 Eq., 529; Benjamin on Sales of Personal Property vs. *Gibson*, 4 C. B., 837; *Hoadly vs. McLaine*, 10 Bingh. *Richardson vs. Smith*, 5 Ch., 648; *Jackson vs. Jackson & Giff.*, 184; *Meynell vs. Surtees*, 8 Sm. & Giff. *Harnett vs. Fielding*, 2 Sch. & Lef., 549; *Collison vs.* 6 Taunt., 224; *Collier vs. Mason*, 25 Beavan, 200; 1 *Duggan*, 1 Ir. Eq. Rep., 311; *Gervais vs. Edwards*, 2 W., 83.]

Paul, (Advocate-General,) and *Philips*.—The learned J the Court below was clearly wrong in dismissing the a point of limitation, which does not arise, as we had no action until the dispute in 1875, when the defendants re settle with us in pursuance of the pottah of the 13th tember 1858.

We contend that the stipulation in the pottah venant that runs with the land, not being a collateral like that in *Keppel vs. Bailey*, for *Erskine* would not in the pottah except on the terms that no other should en land; but however that may be, we are entitled to on equitable grounds as all the defendants have had *Tulk vs. Moxhay*. That the question of perpetuities arise, is shown by the *Tagore case* and *Catt vs. T* pottah and stipulation are perfectly plain and r when construed, as the Court will construe them, with to the whole circumstances of the case—*McLean vs.* The fact that we have an option to take the land when is no objection, especially as we have come in within a time—*Catt vs. Tourle*; nor is the supposed vagueness of lation as to when the land may be required any objection vs. *Provand*. Besides the restriction is not absolute. If restriction that the defendant should not alien to a limited fact a limited restriction on the mode of enjoyment, and will therefore enforce it, especially where it is negativ stance, as it is here—*Lumley vs. Wagner*.

The pottah provides that the parties shall agree amount of rent; and if they do not agree then the Court mine it, as it does not require foreign aid to carry it

execution—*Gourlay vs. Duke of Somerset*. Such pottahs are day carried out by the Courts in the cases of *Ootbundee* where the tenant pays a fair rent for so much land as he rates, and *Junglebooree* pottahs where the ryot pays a reasonable rate for jungle land which he gradually clears.

D. Bell and Stokoe, for defendants.—This is a case for damages, but certainly not for specific performance, because there is no mutuality—*Hamilton vs. Grant*; and because the Court cannot execute the whole contract itself on the ground of uncertainty—*vs. Edwards*. Looking at the whole of the case the contract is too unreasonable and too uncertain. There would be the great difficulty, nay, a practical impossibility, in finding the fair rates, as there is nothing on which inquiries could be based.

Jipsi, in reply.—It is not contended on the other side that the uncertainty as to the price makes the agreement void, but that it makes a decree for specific performance impossible. It cannot be said to be a fundamental proposition of law in this country, whatever it may be in England, that the Courts will not determine what is a fair rent. They do so constantly. This case is not like *Vickers vs. Vickers*, or *Wilks vs. Wilks*, where the fact of this being a contract depended on a reference to arbitration. *Milnes vs. Grey* is an authority for the proposition that an agreement to sell at a fair price will be carried out by the Court. It is not necessary, in order that the contract be binding, that the price or time and mode of payment be expressed—*Valpey vs. Gibson*; *Hoadly vs. McLaine*. It is not necessary that there should be mutuality—*Catt vs. Catt*.

There is in the present case a considerable body of evidence from which a price might be ascertained. For instance the price at which the defendants let the land to the Bengal Coal Company might be taken as a fair price.

Judgment of the High Court (1) was delivered by

G. C. J. :—

This is a suit for specific performance of an agreement to grant a lease of some waste lands in the district of Rancegunge.

(1) GARTH, C.J. and McDONELL, J.

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GARTH, C.J.

The plaintiffs are a Coal Mining Company, who p from Mr. James Erskine, in the year 1861, his interest in which he had taken from the original defendants in this their predecessors in title, of certain waste lands for mining purposes. That instrument was dated the 13th of September. It professed to be a heritable pottah of 51 bighas of *wa motur* land in Mouzah Mahatadihi for quarrying coal, for for orchard, for road-making, and other uses, at a rent 25-8, and a suitable bonus. Mr. Erskine was to quarry erect buildings, and carry on his factory, which he was according to any plan he thought best. Then follow the upon which the plaintiff's present claim is founded: "We aforesaid mouzah we will not give a pottah to any other person, that is to say, we shall not give settlement to any. If you take possession according to your requirements, land over and above this pottah, we shall settle any such with you at a proper rate. Thereat we make no objection."

The persons who granted this lease are a family of who held jointly, as *bromotur* ancestral property, a tract of land called Mahatadihi, containing some 1,312 bighas, of which the Mahatas cultivating only a few of the more fertile patches. The 51 bighas, which were the immediate subject of the lease, were taken possession of by Mr. Erskine, who established a colliery, with roads and other works, and afterwards, on the 16th of August 1861, conveyed his interest to the plaintiffs, who are now seeking to avail themselves of the settlement in the pottah, by which the Mahatas undertook to give any additional land with Mr. Erskine which he might require.

No attempt appears to have been made to enforce the settlement until August 1874, when Mr. Keelan, the manager of the plaintiff's company, took formal possession by beat of drum of the whole of the Mahatadihi tract, to which the defendants were entitled; and in order to proclaim to the plaintiffs more fully his intention, he repeated the same ceremony about the middle of February 1875, on which occasion a bamboo pole was driven into the soil. It appears that the object of the plaintiffs in taking possession was, that they might sell several properties, of which this was one, to the Bengal Iron Works Company; and

carried out, or professed to carry out, by a conveyance dated 7th of February 1875. After first taking possession in 1874, the plaintiffs, through Mr. Keelan, endeavoured to come to an arrangement with the defendants (the Mahatas) as to the terms of settlement; and a good deal of evidence has been given as to negotiations upon the subject which took place between Mr. Keelan and some of the Mahatas.

Mr. Keelan contends upon the strength of this evidence, that an arrangement was actually come to as to the terms of the settlement, and if this could have been established, no doubt the case might have come to this Court with a better chance of success.

But the Judge in the Court below, after a careful consideration of the evidence on this point, has found, as a matter of fact, that no definite arrangement was come to, and that what passed between Mr. Keelan and the Mahatas amounted to no more than negotiations.

We quite agree with him. The oral communications, relied upon by the plaintiffs, took place at the end of February and the 1st and 2nd of March 1875, and we find that, on the 2nd of March, a letter was sent by the defendants to Mr. Keelan, in which the defendants proposed to Mr. Keelan to settle the terms for the additional land which the plaintiffs required at Rs. 5 per bigha rent, and Rs. 5 per bigha for bonus, and the letter contained in this way: "If you should assign, or if you should assume, possession of lands outside those already rented by you, you will be liable to us for the above bonus and rent rate; accordingly we write that, if you are willing to take waste jungle lands for cultivation thereof to be made by us, then on your becoming so in writing to this effect, we shall advise you of the steps to be taken. If, within a week, you do not make an arrangement or settlement at proper terms, then in the event of dealing with other parties no objection of yours will be of avail."

Within a week of the date of this letter, viz., on the 7th of March 1875, Mr. Keelan, on behalf of the plaintiffs, answered it to the defendants (Mahatas) in the following terms:—"As several notices have been sent to you to enter into a settlement for the lands in Mahatadihi, which we occupy under

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the terms of a former pottah; and whereas you also have notice requiring me to enter on a settlement, with which I have acquainted myself; I hereby write to you that I have acquainted myself; I hereby write to you that ready to enter into a settlement. That letter about the a ment, which I sent to Calcutta after writing in your pr has been replied to, and the reply is with me. Theref you, with all your co-sharers, will repair quickly to M Cutchery at Raghunath Chuck, a settlement is likely to be If you fail to appear quickly, then, in accordance with th the rental money will be paid into Court, and applicati be made for a settlement. You are not to show any negl in this matter; we are ready to enter into a regular settl Date Bengali, 7th March 1875, 29th Falgun 1281."

It appears to us quite clear from these letters that, oral communication may have taken place between th previously to the 7th of March, no arrangement as to th had taken place on that date. Mr. Keelan's letter is consistent with any such supposition.

As Mr. Keelan's last letter did not contain an accep the offer proposed by the defendants, the latter appear taken steps at once to carry out the threat contained letter of the 1st of March, viz., that, in the event of a ment being made within a week, they would dispose of th other persons. The Bengal Coal Company, Limited, had in treaty with them for a lease of the property in ques on the 17th of March we find that they conveyed it to th Coal Company (the defendants) at a jumma of Rs. 1-8 p and a bonus of Rs. 6,000, by a mokuraree pottah of t and on the 20th April 1875 a second mokuraree pottah to effect, (so far as the conveyance of the land, the rent bonus were concerned) was made by the defendant Bengal Coal Company. In the first of these pottahs th express allusion to the pottah of 1858 which was ma Erskine, and it was admitted on the argument before us Bengal Coal Company had sufficient notice of the rights arising from that document, whatever those right be. There is no doubt, therefore, that the Bengal Coal are the parties really interested in defending this suit;

the question is, whether this lease to the Bengal Coal Company is to stand, or whether the plaintiffs are entitled under the Act of 1858, to have the land conveyed to them upon terms as the Court should think fit. Upon this ground it was contended in the Courts below that the Bengal Coal Company ought to be made parties to the suit, as being the persons interested in it; but the Judge overruled the objection, and ultimately dismissed the suit upon the point of limitation. At this point we shall notice more fully hereafter. Upon the case coming before us on appeal, the objection was again raised by the appellants that the Bengal Coal Company ought to be made parties to the suit; and we considered that the objection ought to fail. We thought it quite clear that they were the persons interested in the result of the proceedings, and that as the land was conveyed to them for the purpose of avoiding future litigation, they were clearly to be made parties under section 73 of the Civil Procedure Code, Act VIII of 1859.

We accordingly made an order to this effect: "Having regard to the point which was argued on Tuesday last by Mr. Stokoe, and thinking it right and advisable in the interests of all parties concerned, that the Bengal Coal Company should be made parties to this suit. The Judge should have made them parties in the Court below. We, accordingly, adjourn the hearing of the appeal to a future day, of which due notice will be given to the parties; and in the meantime we direct, under section 73 of the Act VIII of 1859, that the Bengal Coal Company be added as defendants, and that notice of that fact be served upon the plaintiffs as prescribed in that section. The plaintiffs, if so advised, shall be at liberty to file, within a week from this date, an amended plaint, so as to include in it any claim which they may have against the Bengal Coal Company; and the Bengal Coal Company will be at liberty to file their written statement within a week of the filing of the amended plaint. The Bengal Coal Company will also be at liberty to produce any evidence they think proper, when the case comes on again before the Court."

After the Bengal Coal Company have filed their written statement, a day will be fixed for the further hearing of the

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 GARTH, C.J.

The case was accordingly adjourned; the Bengal Coal Company were made defendants, and put in their answer; the case came before us again for re-hearing. The Bengal Coal Company, however, have raised no other points of defence than which were urged by the Mahata defendants in the Court and we have no doubt that the Judge was quite right in saying that the Mahata defendants were in fact fighting the case of the Bengal Coal Company.

We will now proceed to deal with the point of limitation which the Judge in the Court below dismissed the suit. We will assume for this purpose that the contract contained in the pottah of 1858 was one capable of being enforced in this Court by a suit of specific performance; and assuming this, we are unable to understand the grounds upon which the Judge decided in the defendants' favour. In the first place, we do not see why a six-years' limitation should be applicable to a suit of this kind at all; nor in the next place, if it were applicable, the time should run from the making of the contract, or from the breach of it. It appears to us quite clear from article 113 of schedule II of the Limitation Act (IX) of 1877 that the three years limitation runs, not from the time of making of the agreement which is sought to be enforced, but from the time when the plaintiff has notice that his right has been denied. Suppose, for instance, an agreement made with A on the 1st of January 1870, to grant him a lease of certain land. A applies for his lease on the 1st May 1871, and his application is refused. The three years' limitation in such a case would run from the latter date; and A might bring a suit for specific performance of the agreement at any time before the 1st of May 1874. We think it clear, therefore, that in this case the Judge has made a mistake; and that as the right in this instance was not denied till the month of May 1875, the plaintiffs had three years from that time to bring their suit.

The other questions as to covenants running with the land, and the time during which the agreement was to remain in force, if it were capable of being enforced at all, it will not be for us to decide; because we are of opinion that upon

1, which specially applies to this particular case, the plaintiff must be dismissed. Their claim is to have the agreement of the 13th of September 1838 enforced with reference to the whole of the property, of which they took symbolical possession in February 1875; and as no terms were fixed by that agreement as to rent and bonus, they ask the Court to say, or to say by reference to the Registrar, what would be the proper rent and bonus to be paid by them for such additional lands.

There certainly does appear to be authority for the proposition, that where a contract is made to sell land at a fair price, and there is no difficulty in ascertaining what a fair price would be, the Court would take the usual means of ascertaining it, and decree performance of the contract accordingly. (See *Gaskarth vs. Lord Lowther*, 12 Vesey, 107; Sugden's *Law and Purchasers*, 11th ed., p. 327). The price or the rent might readily and fairly be fixed as between buyer and seller where the property is of an ordinary character, and its value generally known or ascertainable. But having regard to the peculiar character of the property in question in this case, and the uncertainty that must necessarily exist as to its value, it really is quite impossible for the Court to ascertain by any means in their power, what would be the fair terms of a proposed settlement. If the land contains, as both parties allege it does, a quantity of coal and other valuable minerals, there is no doubt that the 51 bighas which were taken by the plaintiffs under the pottah of 1858, were sold by the defendants at a price infinitely below their proper value: and it is very clear, upon the same supposition, that the Bengal Coal Company have also made a very advantageous purchase of land in question. The truth is, that the value of the land under these circumstances must always be to a great extent a matter of guess and speculation; and the Court have therefore failed of ascertaining by the ordinary method, what rent or bonus the plaintiff should pay. For these reasons we are of opinion that upon this ground alone, apart from the other objections which have been taken, and upon which we give no weight, that this appeal must be dismissed with costs as against the defendants.

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Judgment.
GANTH, C.J.

[CIVIL APPELLATE JURISDICTION.]

1878
March 14.

P. N. POGOSE SON OF JUDGMENT-DEBTOR
AND
BEEBEE DISHKOON WARIS } DECREE-HOLDER.
CALCHUCK }

Jurisdiction—Appeal—Act VIII of 1859, sections 210, 364—High Court Charter Act, section 15.

Section 364 of Act VIII of 1859 does not allow an appeal from an order or proceeding under section 210.

Where an application has been made to place the legal representative of a deceased judgment-debtor on the record for the purpose of executing the decree executed against him, the Court to whom the application is made is the sole judge of the question whether the person whose name is sought to be placed on the record, is or is not the legal representative of the deceased judgment-debtor, and his position on this point will not be interfered with by the High Court under section 15 of the High Court's Act. But where the Judge has placed the name of a person on the record whom he does not and could not consider to be a legal representative, without making any inquiry whether he is so or not, and merely for what he deems to be the convenience of all parties, such order may be set aside by the High Court under the powers conferred by that section.

THIS was one of a series of cases which arose out of proceedings passed by the Subordinate Judge of Dacca. It appeared that Mr. P. N. Pogose, zamindar of Dacca, a British subject domiciled in British India, died in November 1876. Previous to his death several decrees had been passed against him, and his property conveyed to the Official Trustee for the benefit of his creditors. No letters of administration to the estate of the deceased were taken out. One of the judgment-creditors, Raygo, applied to the Court of the Subordinate Judge of Dacca under section 210 of the Code of Civil Procedure, Act VIII of 1859, for execution of the decree against property of the deceased which was in the hands of his son P. N. Pogose. The application was granted, but this order was set aside by the

Dacca, on appeal. The decree-holder then applied to the High Court to set aside the order of the Judge as one passed without jurisdiction, when the following judgment was delivered by the Court (AINSLEE and McDONELL, J.J) :—

"We think that the judgment of the lower Appellate Court must be set aside under the powers vested in this Court by section 15 of the High Court's Act, on the ground that no appeal lay to the Judge. This proceeding is under section 210, and the same rule applies to it as to proceedings under section 208, where the decree-holder is changed. It is observed in the judgment of their Lordships of the Privy Council in the case of *Abedoon-ra. Ameeroonnissa*, I. L. R., 2 Cal., 327, that section 364 allows no appeal from an order or proceeding under section 208."

"There being no appeal to the Judge, the order of the first Court must stand, but the Subordinate Judge must bear in mind that in proceeding to sell the property in the hands of the son of the deceased judgment-debtor the Court can only do that which the son himself can do. If the right of sale has been in any way taken away from the son except with the consent of a third party, the Court cannot, on his behalf and in the name of the third party, exercise the right of sale. It may probably be necessary to make other persons parties to this proceeding in order to give title to the auction-purchaser in the event of a sale."

"In the meantime the Subordinate Judge, at the instance of one of the judgment-creditors, Khajah Asanoollah, had, for auction purposes, substituted the name of P. N. Pogose on the record of another case for that of the deceased. An application was made to the High Court under section 15 of the High Court's Act for the purpose of having this order set aside. On the hearing of that application the following judgment was delivered by GARTH C.J. (MITTER, J., concurring) :—

"I think that this rule should be discharged. It is an application under section 15 of the High Court's Act, to set aside an order made by the Subordinate Judge of Dacca, admitting the applicant a defendant on the record as representing the deceased judgment-debtor, and ordering the sale of the property to proceed accordingly, and the ground upon which the application was granted was, that the Subordinate Judge had no jurisdiction to make that order. The Subordinate Judge was undoubtedly wrong in making the order complained of, and the question which we have to decide is whether the order was merely an erroneous decision in a matter which was for the Judge to determine, or whether it was a nullity, as made by one without jurisdiction. The Judge was clearly not justified in placing the applicant on the record, and he ought to have known his duty better,

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o.
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DISHKHOON
WARIS
CALCHUCK.

Statement.

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 —

than to have made an order of this kind directly in the teeth of the provisions of the Succession Act, and without making any proper enquiry as to whether Mr. Pogose, who was put upon the record, was the proper representative of the deceased. He was also very wrong in making an order of this kind on the very day that the sale was to take place. Such an order was obviously calculated to bring about a sale of the property at an inadequate price, and if we were satisfied that the order of the Subordinate Judge was made without jurisdiction, we should certainly have set aside the order, and the sale which took place under it.

But it appears to us, having regard to the provisions of the P. N. Code, that the Subordinate Judge was the proper person to decide the point of fact, as well as of law, as to who was the proper representative of the deceased. The person who was put upon the record was the judgment-debtor's eldest son. He was summoned in the regular manner under section 216, to show cause why he should not be made a party to the suit, and why the decree should not be executed against him. It appears that he came before the Court in obedience to that summons, and that there was not that he had not been duly made the legal representative of the deceased under the Succession Act, but that he had no longer any right to do with his father's property, which had been conveyed away by the Official Trustee for the benefit of the judgment-creditors.

Whether he took the proper point or not, the Subordinate Judge was very wrong in dealing with the matter as he did; but he was clearly not the only proper person to decide the question. Suppose two persons, both claiming to have been made representatives of the deceased person under the Succession Act, had appeared before the Court, and that the only question was, which of them was the legally proper representative. That question must have been determined by the Subordinate Judge. We are therefore of opinion, that he has not shown that he was without jurisdiction in deciding that the applicant was the proper person to be put on the record, but that he has been guilty of an error of law. The present applicant might have rectified if he had appealed within the proper time. He has not chosen to take that course. He has allowed the matter to go by; and now he asks this Court to put its extraordinary powers to assist him out of the difficulty. This Court under the circumstances has no power to help him, and the rule must be discharged with costs.

The present appeal was from a similar order passed by the Subordinate Judge at the instance of another of the judgment-creditors, Beebee Dishkoon Waris Calchuck.

Mr. McNair, for Appellant, contended that, the deceased judgment-debtor being an Armenian, his estate was subject to the Indian Succession Act (X of 1865), and that under

190, no person could be dealt with as the legal representative of the deceased, unless he had taken out letters of administration. There was no hardship to a creditor in this rule, as in 222 provided him with a remedy so as to enforce his claim.

Shoo Bhoobun Mohun Doss, for Respondent, cited *Abedunnissa Khan* vs. *Ameerunnissa Khatoon*, L. R., 3 Ind. App., 66; L. R., 2 Cal., 327; and *Sooba Beebee* vs. *Fukurunnissa Begum*, L. R., 331; he also relied upon the terms of the order passed by Justice AINSLIE on 28th August last. (See page 279, ante.) *McNair*, in reply, cited 20 W. R., 280.

Judgment of the High Court (1) is as follows:—

In this case we think that the order of the Subordinate Judge, as it makes the present applicant, Mr. P. N. Pogose, a party to execution proceedings, must be set aside. The original debtor was dead. He was an Armenian, and therefore the law relating to his estate is governed by the Succession Act, and the only person who could be his representative is the person appointed by that Act. The only difficulty at all about the matter is, whether there is an appeal against the order of the Subordinate Judge or not. Whatever our own opinion may be, however, it is better that in this particular case we should follow the decision of Mr. Justice ARNSLIE and Mr. Justice McDONELL in a somewhat similar case on the 28th August 1877, in which it was held that no appeal lies; and, for the purposes of this case, adopting that decision, we hold that no appeal lies in this case also. But, nevertheless, although no appeal lies, we think it clearly a case in which we ought not to allow this order of the Subordinate Judge to stand. It is quite certain that it must lead to the greatest possible confusion and to the interest of the parties in this case, if this execution proceeded with in the shape in which the proceedings stand. That warning has already been addressed to the Subordinate Judge in the very judgment to which I have referred. Possibly that judgment was not before him when he made the order now complained of; but it appears that there was

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 P. N. POGOSE pointed out that he had done entirely wrong in putting
 v. P. N. Pogose upon the record in defiance of the Succession
 BEEBEE We are wholly at a loss to understand why the Subordinate
 DISHKOON Judge, in spite of these warnings of this Court, in
 WARIN persevering in this course; and we think that on this
 CALCHUCK. judgment, to interfere under section 15. But he has not
 Judgment. that question in this case. He could not venture to decide
 whether Mr. P. N. Pogose was his father's representative in the
 the Chief Justice's judgment and the Succession Act, he really does is this. He chooses to take upon himself
 that the proceedings pointed out by the law would be inconvenient to the parties; and thinks that he would do
 good to them by taking the course which he has taken. We have already said, the result of taking that course
 disastrous to the parties; and we think we are fully justified in interfering in this case. The order of the Subordinate
 putting Mr. P. N. Pogose upon the record as the legal representative of the deceased, without inquiring whether he is
 is an order which cannot be allowed to stand. Properly ought to have been a formal application under section 15,
 as there has been some difference of opinion between the members of this Court upon this matter, we think that we are justified in
 treating this case substantially as an application under section 15, without putting the parties to further expense.

Dealing with this case under section 15, we direct the order of the Subordinate Judge, putting Mr. P. N. Pogose upon the record as the representative of the deceased, be set aside.
 We make no order as to costs.

[CIVIL APPELLATE JURISDICTION.]

MA BANK (LIMITED) PLAINTIFF;

AND

RONI DHUR SEN AND OTHERS DEFENDANTS.

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concern—Mortgages in possession—Sale of Patni Talook—Darpatni Regulation VIII of 1819—Representative—Execution of decree—Injunction—Act VIII of 1859, sec. 216—Maxims of Equity.

In 1861, A mortgaged an Indigo concern to B, who afterwards entered into possession as mortgagee. While B was in possession, a patni included in the mortgage was brought to sale and sold for arrears of rent under the provisions of Regulation VIII of 1819. As a consequence of the sale, the darpatni rights of C in this talook were cancelled; and in 1867, C brought an action for damages against the executors of A, in which he got a decree. In 1869, the executors of A sold the equity of redemption in the concern to B, and subsequently on C's application, his name was, without objection on his part, substituted on the record as the representative of the judgment-debtor. B afterwards applied under section 15 of the Charter Act to have the order of substitution set aside, but his application was refused. *Held*, by WHITE, J., (MITTEE, J., dissenting,) in a subsequent suit for an injunction, that B was entitled to have C restrained from executing the decree against him.

Held, also, by WHITE, J., (MITTEE, J., dissenting) that the fact of the plaintiff's not appearing to oppose the substitution of his name on the record as the representative of the judgment-debtor, did not disentitle him to an injunction in this case, because the order not being warranted by the provision of section 216 of Act VIII of 1859, under which it was professed to be made, was *ultra vires* and therefore a nullity. *Effect of the rule, "He that seeks equity must do equity."*

CIVIL APPEAL from a decree passed by the Officiating District Judge of Jessore.

In this case it appeared that an Indigo concern, called the Bonga concern, was mortgaged by its proprietors to the Bank of Masterman's Bank in 1861, and the Bank, under the terms of the mortgage, entered into possession in 1866. Amongst the properties appertaining to this concern, was a patni talook at Kalabaria. One Brojo Nath Dutt was the dar-patnidar of

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this talook. While the Bank was in possession of the patni, 8 annas kist of the rent for 1273 (1866) not having been paid, the talook was sold under the provisions of Regulation VIII. 1819. The consequence of that sale was that Brojo Nath's dar-patni right was cancelled.

On the 25th day of January 1867, Brojo Nath brought a suit against the executors of Messrs. Gilmore McKilligin & Co., proprietors of the Indigo concern, and others, for damages sustained by him by reason of the cancellation of his dar-patni rights. On the 3rd of June 1867, the suit was decreed, and it was declared that Brojo Nath was entitled to realise the damages "from the estate of the original patnidars." Brojo Nath applied to the defendant's predecessor in title, Giridhur Sen, for this decree to the defendant's predecessor in title, Giridhur Sen.

On the 11th of August 1869, the executors of J. P. McKilligin (the last surviving member of Gilmore, McKilligin & Co.) sold the right of redemption of the Indigo concern, with *dena* and *powna*, to the Agra Bank. In 1871, Giridhur Sen applied to the Court in which the decree was passed to substitute the Agra Bank in the place of the original judgment-debtor, on the ground that the Bank had purchased the entire right in the Patherdunga Indigo concern with *dena* and *powna*. A decree was issued and duly served upon the manager of the Bank, under advice, refrained from taking any notice of the application of Giridhur Sen, which was granted.

In December 1874, the defendants executed the decree against the Agra Bank, and the manager on this occasion appeared and opposed, but his objections were overruled. He then applied to the High Court, under 24 and 25 Vict., c. 104, section 15, to set aside the proceedings by which the plaintiffs' case were substituted in the place of the original judgment-debtors. On the 3rd of March, this application was refused by the High Court; and on the 12th of August 1875, plaintiffs instituted the present suit, praying that the substitution of the 21st of June 1871 be declared wholly illegal; that the same, together with all the proceedings taken thereunder, be set aside; and that an injunction be issued restraining the defendants from taking any further proceedings against the plaintiffs under the decree dated the 3rd of June 1867.

is, for Appellant. *Mr. Morgan*, with him.

so *Sreenath Doss* and *Baboo Rash Behary Ghose*, for Res-
its.

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following judgments were delivered by the High Court (1):—

1, J:—

appeal is similar in its main features to Regular Appeal
of 1876, between the same appellants and Moharaui
andri Debi, and which has been recently decided by this

The chief differences are, that in this case the decree
to be enforced against the appellants was obtained against
executors of Messrs. Gilmore, McKilligin and Company, and
respondents, although they have taken steps to execute
decree against the appellants, have not as yet turned them
the possession of any of their property.

of opinion that the lower Court is wrong in holding that
respondents could, by any proceeding under the 216th section,
other section of the Code, enforce their decree against the
appellants. That decree was obtained by a party in whose shoes
respondents now stand, on the 3rd of June 1867, against the
executors of Messrs. Gilmore, McKilligin and Company and

Assuming that the debt covered by the decree fell
under the description of the *dena-powna* of the factory of
Munga which the appellants agreed to take over in 1869
they accepted a conveyance of the factory from the exe-
cutors of Gilmore and Company and their mortgagees, and
also that the appellants have come under a liability
to respondents by virtue of that agreement, still the appellants
are not the representatives of any of the original parties to the
decree. The executors of Gilmore and Company were living on the 21st of June 1871, when the
appeal was brought on the record, and even if they had been
dead the appellants were not their representatives within the
meaning of the 216th section of the Code.

also of opinion that the lower appellate Court is wrong
in holding, as it appears to have done, that the failure of the

(1) WHITE and MITTER, J.J.

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appellants to show cause when notice was served upon the the 216th section, precludes them from bringing any other than one to set aside the order of the 21st June 1871 questions relating to the execution of a decree which 1 section of Act XXIII of 1861 directs shall be determined by the order of the Court executing the decree, are questions that arise between the parties to the suit in which the decree is made. The appellants were not originally parties to the suit, although they were subsequently made parties in the proceedings for executing the decree, the proceeding is, in my opinion, valid and not nullity. The Court executing the decree had no authority to order them to be made parties, and the fact that the appellants did not show cause against the order did not deprive the Court with jurisdiction.

The question remains whether the appellants are entitled to the relief which they pray for. As regards the prayer to set aside the order of the 21st of June 1871, they are barred, inasmuch as more than a year has elapsed between the making of the order and the bringing of the suit. But they are entitled to an injunction against proceedings to execute the decree.

It is clear that the respondents have not allowed the decree to remain a dead letter, but have taken steps to execute the property of the respondents. In December 1871 they procured an attachment to issue against the immovable property of the appellants, and in the application for the attachment the respondents mentioned amongst other property the property in Calcutta, in which the appellants are now carrying on business, and there is reason for believing that, if this injunction is not granted, the respondents will proceed to attach the premises up for sale. The result of this will be great inconvenience and probable injury to the appellants' business, but to involve in litigation with the appellants persons who, from the failure of this suit, may be greatly benefited.

Having regard to the principles upon which the Court of Equity grants relief against enforcing a void agreement, it is that the appellants are entitled to the assistance of the Court.

y of injunction. I do not think they are bound, before
ing a suit, to wait till they are turned out of possession,
& the Court should leave them to resist, as best they can,
proceedings as may be taken by a purchaser under an
tion sale, to turn them out of possession. It is contended,
er, that the appellants are disentitled to an injunction,
as they omitted to show cause against the order of the
of June 1871. It is stated by their Counsel that they
ly abstained from appearing, lest, if they should fail in
opposition, the matter should be treated as *res judicata*
event of their taking independent proceedings to set aside
der—a matter which in the then state of the authorities
subject of much doubt. However that may be, I think
the Court had no jurisdiction to make the order, their
to show cause does not preclude them from getting the
they ask for, when they are not only threatened with the
ment of, but steps have also been taken to enforce, the
order. I may add that, although the appellant did not
the issuing of the order in the Court executing the
they did, before bringing this suit, apply to this Court
section 15 of the Charter Act to set aside the order as one
without jurisdiction, but the application was refused on
ble ground that they had not resisted the making of
d order in the Court below, and that they had another
by which they could protect themselves against the
ment of the order.

also argued before us that the appellants are really
the respondents under the *dena-powna* agreement to
judgment-debt recovered by the respondents against
utors of Gilmore and Company, and that, if that is so, it
is inequitable to grant them an injunction in the present
if an injunction is granted, it should only be on the
discharging that liability.

appellants, on the other hand, contend that the judgment-
not part of the *dena-powna* which they agreed to take
and that even if it is so, they have incurred no direct
to the respondents in respect thereof. I pronounce no
whether the appellants could or could not be made liable

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to the respondents if the latter brought a proper suit purpose. Nor am I called upon to do so in the pre But assuming that the appellants could be successfully the respondents, that circumstance appears to me to be reason why the appellants should be refused the injunction that it should be only granted to them on terms. The of the injunction will not alter the position of the respondents as regards their right, if it exists, to recover the debt proper suit, and the withholding of the injunction enable the respondents to recover the debt from the appellants under the decree of 1867. In fact the question of the appellants' liability in such a suit is not a matter necessary to be determined in this suit, and can therefore give rise to no question in favour of the respondents in this suit. If we were to determine the question now, we should, in doing so, be travelling into a question not properly in issue in this suit for the mere purpose of determining upon a reason why the injunction should be refused or granted on terms. As bearing on this point, I would refer to the case of *Gibson vs. Goldsmid*, 5 D. M. & G., 757.

I would, therefore, allow the appeal with costs, set aside the decree of the lower Court, and grant to the appellants an injunction, restraining the respondents and each of them from proceeding to execute the decree of the lower Court of 1867, and give the appellants their costs in the lower Court.

MITTER, J. MITTER, J. :—

In this case I regret that I cannot come to the conclusion to which my learned colleague has come. It seems to me, upon the facts admitted and proved, the plaintiffs are entitled to the injunction which they pray for. [His Lordship stated the facts as set out in the statement of the case, continued.] I agree with my learned brother that, if their prayer to set aside the order of the 21st June is granted, the plaintiffs are barred by the law of limitation. But in their prayer for an injunction I am unable to agree with my learned brother.

The question, whether, under the *dena-potona* clause of the conveyance of the 11th of August 1869, the plaintiffs are entitled to satisfy the decree of the defendants, has been

it, properly raised, by the defendants in their written statement. With reference to this defence, the fourth issue framed in the lower Court. The plaintiffs did not object to the issue being raised in this suit, and I am of opinion that if they had raised that objection it should have been overruled, as it seems to me that if their liability under the *demerit* clause is established, their prayer for injunction ought to be granted.

In this point my learned brother has referred to the case *Reynolds vs. Goldmid*, 5 D. M. & G., 757. It seems to me that authority is rather in support of the view that the injunction prayed for ought not to be granted, if we come to the conclusion that the plaintiffs in justice are bound to satisfy the claims of the defendants.

In that case the defendant transferred certain shares in a company, and, having recited this fact in a certain deed made between himself and the plaintiff, undertook to execute a conveyance (if necessary) to give effect to the afore-said transfer. It appears that the plaintiff and the defendant were partners in a certain business, and in another part of the deed referred to, the plaintiff covenanted to indemnify the defendant from and against co-partnership debts.

It was subsequently discovered that a formal conveyance was necessary to give effect to the transfer of the afore-said shares, and the plaintiff accordingly asked the defendant to execute a conveyance. The defendant declined to do so, and the plaintiff would re-pay him a certain sum of money, but the defendant, after the execution of the first deed, was compelled to pay in respect of a debt which was incurred by the plaintiff's covenant of indemnity. It was decided that the objection of the defendant did not form a good defence to a suit which was brought to compel the defendant to execute a formal conveyance of the transferred shares. In the judgment of the Lord Justice KNIGHT BRUCE, the following passage occurs: "A rule perhaps sometimes misunderstood, perhaps wide in meaning than in expression, that a plaintiff for equity must do equity, is without application in the present instance, as I view the matter. That unity of subject, or

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 Judgment. MITTAL, J.

connection between subjects, which calls it into operation I think, wanting." The Lord Justice TURNER, in his judgment with reference to the application of this rule of equity "It is restricted in its operation, and the true meaning I apprehend, is this, that those who ask for the assistance of the Court must do justice as to the matters in respect of which assistance is asked." He quotes the observations of SIR WIGRAM in *Hanson vs. Keating*, upon this point, and SIR WIGRAM explains the rule in the following way: "It," in question, "decides in the abstract, that the Court will grant the plaintiff the relief to which he is entitled will do so on the terms of his submitting to give the defendant the corresponding rights (if any) as he also may be entitled to in respect of the subject-matter of the suit." In p. 17, Kerr on Equity (edition of 1867) the authorities upon this point are collected and the rule laid down with great precision.

It seems to me clear, upon a careful consideration of the authorities, that we ought to apply this rule of equity in this case. In the language of the Lord Justice KNIGHT BRUCE, in this case "that unity of subject" which calls it into operation. The plaintiffs pray for an injunction restraining the defendants from taking further steps to realise a certain debt from the defendants on the ground that the order of the Court authorising the defendants to take these steps is *ultra vires*. The defendants answer, that the Court's order is without jurisdiction, and that it is not for the justice to pay that debt. It is to the same identical debt which is the plaintiffs' prayer in the plaint, and the defendants' defence in their written statement, relate. It cannot, therefore, be said that there is a want of "unity of subject-matter." I am of opinion that the matter raised in the 4th issue of the plaint, and the lower Court was properly raised in this case, and in the defendants' favour, would disentitle the plaintiffs to the relief which they pray for. In page 767 of the Report of the Commission in *Gibson vs. Goldsmid* already quoted, there is a statement which very nearly approaches to the facts of this case. "If a bill be filed by the obligor in an usurious bond, to the effect that the bond be cancelled, against it," says Sir JAMES WIGRAM in this illustration, "in a proper case will cancel the bond, but only upon the ground that the bond is usurious."

refunding to the obligee the money actually advanced."

In this case the plaintiffs are entitled to the relief which they

only upon the terms of their paying this judgment-debt
defendants.

Next question, therefore, that I have to determine is
under the *dena-powna* clause of their conveyance the
are liable in respect of this judgment-debt. The judg-
of the Full Bench in *Kearnes vs. Bhowani Churn Mitter*,
in p. 54, B. L. R., Supplementary Volume, is an-
in point upon this question. Having regard to the
the agreement between the Agra Bank and the executors
Higin, as recited in the bill of sale of 1869, it seems to
this Full Bench decision is a clear authority for holding
plaintiffs are liable in respect of this debt, which was a
the factory. This ground alone, I think, would be suffi-
disentitle the plaintiffs to the injunction which they pray
independently of it, there is the further fact that the
conduct in the execution proceedings has been such as
exclude them from obtaining the relief which they seek
suit.

As, although notice of the defendants' application was
them in 1871, took no steps to contest it; the Court
granted the defendants' application. In 1875, they, for
time, took exception to the action of the Court, when
the defendants' right to recover this judgment-debt from
separate suit was barred by the law of limitation.

As to me also that their silence in 1871 is capable of
explanation, that they, believing that they were liable for the
debt, did not think it worth their while to take any
the form of the proceeding adopted by the defendants
the payment of that debt. If that be so, the plaintiffs
not entitled to any relief in this case.

It has been said that if we refuse to grant the injunction
in this case, it is probable that innocent third parties
injured by our refusal to suppose that the execution
taken against the plaintiffs are valid in law. Having
the course of litigation which has taken place between
to this suit, I do not think it is at all likely that a

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third party would come forward to bid for any property might be put up to sale in execution of the defendants' decree.

For these reasons I am of opinion that the plaintiffs are entitled to the injunction for which they pray. In this case, it is not necessary for me to express my opinion on the other questions raised before us. I would therefore dismiss the appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

March 13. **RAM GOLAM SINGH AND OTHERS DEFENDANTS**
AND
HEET NARAIN SAHOO PLAINTIFFS

Suit for possession—Trespasser—False Statement of Cause of Action

Where a plaintiff brings a suit for possession, alleging that the defendant is a trespasser, the moment it is shown that the defendant is not in possession as a trespasser but holds as a tenant or plaintiff, the suit must be dismissed, no matter what the character of that tenancy may be.

SPECIAL APPEAL from a decree passed by the Sessions Judge of Sarun, reversing that of the Moonsiff of Purnea.

This was a suit for possession. The plaintiff stated that Coomar Singh, the proprietor of the land in dispute, granted pottah thereof to plaintiff's father, in Bhadro 1256; that his father held, and he himself now holds, under that pottah; that the land was sub-let to the defendants in 1280, for one year, and that on the expiration of that year they refused to give up possession. The defendants claimed to hold under a pottah granted to them by the plaintiff's father in Aassar 1258, and alleged that they had been in possession under that pottah since 1258.

The Moonsiff fixed the following issues:—(1) whether the plaintiff is entitled to recover possession on the grounds set forward in the plaint; and (2) whether the pottah produced by the defendants is genuine. He found that the defendants had all along been in possession of the land; that it was

the land had been let to them for one year only ; and that pottah produced by them was genuine. On appeal, the subordinate Judge considered that the Moonsiff had found the defendants' pottah not proven ; and he held that the defendants, being admitted that they were lessees of an occupancy ryot, had no right of occupancy, and were liable to be ejected. He, therefore, reversed the decision of the Moonsiff. The defendants brought this special appeal.

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Statement.

Shroo Judunath Sakoi, for Appellants.

Shroo Doorga Pershad, for Defendant.

The judgment of the High Court (1) was delivered by

AINSLIE, J. :—

AINSLIE, J.

The plaintiff has chosen to frame his suit on the allegation that he was in possession, and that he sowed the crop, and that the defendants entered and cut it, and so dispossessed him. If he succeed at all, he must succeed on proof of this allegation. The moment it is shown that the defendant is not in possession as a trespasser against the will of the plaintiff but as tenant of him, the suit must be dismissed. No question arises as to the quality of the tenancy of the defendant. The only question is, whether there was any tenancy or not? If there was no tenancy, the plaintiff is entitled to recover. If there was a tenancy, it is clear that the plaintiff's suit, which is based on the allegations, must be dismissed. The Court will not allow a party to come in and seek a decree on allegations intentionally and materially false.

The evidence given by the plaintiff goes to show the existence of a lease from the zemindar, but this does not establish the right of the plaintiff any more than the admission of the defendant that he holds under a pottah obtained from the plaintiff's agent.

The Subordinate Judge is entirely wrong in saying that the Moonsiff finds the pottah unproved ; he has on the contrary accepted it as certainly genuine. The Subordinate Judge found that there was a tenancy, though not such as alleged in the plaintiff's complaint, from which it follows that the case of the plaintiff

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must fail ; and, although his decision as to the value of pottah propounded by defendant is bad and must be quashed, it is unnecessary to send the case back for further enquiry on that point. The suit is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

March 25. **BABOO LALL SAHOO DEFENDANT**
AND
DEO NARAIN SINGH AND OTHERS PLAINTIFFS

Grounds of Regular Appeal binding in Special Appeal—Right of Occupancy—Admission—Limitation of Right—Powers of Landlord

The fact that a party has appealed from the decree of the First Instance solely on the ground that evidence on a particular point was excluded by the Court, is sufficient to tie him down to that point in special appeal.

A ryot, who relies upon a right of occupancy, must be prepared to admit that the letting was of such a character as is contemplated by Act VIII (B.C.) of 1869, which applies only to agricultural holdings.

Where land was let on the understanding that it was to be used for cultivation, the fact that the ryot has acquired a right of occupancy does not alter any of the terms of the letting, except the condition (if any) fixing a term for the tenancy.

The statutory right of occupancy cannot be extended so as to include complete dominion over the land subject only to the payment of a rent liable to be enhanced on certain conditions. The tenant is still entitled to insist that the land shall be used for the purposes for which it was granted ; and, although a liberal construction may be adopted, it cannot extend to a complete change in the nature of the enjoyment.

SPECIAL APPEAL from a decree passed by the Sub-Judge of Shahabad, affirming that of the Saddar Magistrate at Arrah.

This was a suit for an injunction to compel the removal of a wall built by the defendant, a ryot in occupation of land which had been let for purposes of cultivation, and to restrain him from erecting a *pucca* house thereon. Both the lower Courts gave plaintiff a decree, and defendant appealed specially.

and that the erection of the house was a lawful use of his land, and that the lower Courts were wrong in giving plaintiff decree until he should have shown that he had sustained some injury. The remaining facts are sufficiently given in the judgment of the Court.

Verdict for the Appellant. Baboo Mohesh Chunder Chowdhry and him.

Baboo Hem Chunder Banerjee, and Baboo Kally Kishen Sen, Respondents.

The judgment of the Court (1) was delivered by

THE J. :—

The defendant, who is the special appellant, purchased from Nuro Pandey, a portion of what was described as a Guzashta or holding on a rent not liable to enhancement. He intended to build a house thereon, whereupon the plaintiff brought this suit to compel him to remove the foundations of the house already laid, and to abstain for the future from building on the land. The plaintiff has not claimed a right to oust the defendant from the land, and, therefore, it may be taken as admitted that the latter has the same rights therein as his vendor. The first Court having found that Nuro Pandey had an occupancy right, but not a right to hold at a fixed rent, went into the question whether it had been established that an occupancy ryot, by custom of the village, could transfer his tenure, and held that the defendant had failed to prove such custom. The Moon-judges consequently gave a decree in favour of the plaintiff. On appeal the Subordinate Judge affirmed the finding that the defendant was not protected from enhancement, and also held that no rule of transfer of occupancy rights, without the consent of the landlord, had been established. This last finding is irrelevant, as ejectment is not sought. He went on to hold that Nuro Pandey had no right to build, and consequently could give no such right to his vendor. He assumes it to be an established rule that a tenant cannot build on land held by him for cultivation, and supports this view by a reference to a case in 24 W. R., 220—*Chunder Chowdhry v. Eshan Chunder*.

(1) *AMESLIN and McDONNELL, J.J.*

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Statement.

AMESLIN, J.

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 Judgment.
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In that judgment the Court said: "It may well be that particular places ryots having rights of occupancy in land for agricultural purposes may by custom have the right to transfer it to any person to hold for the same purpose, but that will not carry with it the proposition that a person who may be desirous of erecting a large house in the midst of an agricultural estate can buy up the tenures and rights of several cultivators and convert the land which they formerly occupied into a dwelling house and appurtenances." These observations, however, are qualified by what follows. The Court did not dispose of the case simply on that view of the law, but remanded it for consideration among other things, as to whether any or what expression of law resulted to the plaintiff from the acts complained of. It is, however, to be borne in mind that in that case the defendant was a co-sharer in the estate. It is complained that the Subordinate Judge ought not to have affirmed the decree in favour of the plaintiff without enquiring whether any injury would result to the plaintiff from the building commenced by defendant, and without requiring him to give further evidence to establish the Guzasht of Nuro Pandey.

It appears that the defendant had witnesses present who never quitted the Court before the Moonsiff was ready to examine them, and without the leave of the Court. The Moonsiff proceeded with proceedings against them in the Criminal Court, but refused to bring them in for examination. The Subordinate Judge states that the defendant's complaint before him was that the witnesses would have proved the custom of alienating occupancy rights, but that this is immaterial, as he holds that an occupancy ryot cannot build. Reference has been made by the court to what is called the *imnavisee* of witnesses. This, I think, is of no importance. A party is not tied down to any particular line of inquiry indicated in a list of his witnesses; but that his complaint to the lower appellate Court was based on the exclusion of evidence on a particular point, is sufficient to bring him down to that point in special appeal.

As to the other objection, I think we must hold that a person who relies upon an occupancy right, must be taken as admitting that the letting was of such a character as is

and in Act VIII (B. C.) of 1869, and it has been held that law only applies to agricultural holdings. If then we take that the land was let on the understanding that it was to be let for cultivation, the fact that the ryot has acquired a right of occupancy, does not alter any of the terms of the letting, or the conditions (if any) fixing a term for the tenancy. The statutory right of occupancy cannot be extended so as to include complete dominion over the land, subject only to payment of a rent liable to be enhanced on certain conditions. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted; and, although a liberal construction may be adopted, it cannot extend to a complete change in the mode of enjoyment. The appeals must be dismissed with costs.

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[CIVIL APPELLATE JURISDICTION.]

SHEE BHOOSUN VAKEEL PLAINTIFF;
AND
ODON MOHUN CHATTOPADHYA AND }
OTHERS DEFENDANTS.

March 28.

Enhancement of Rent—Service of notice—Waiver by conduct—Grounds not taken in appeal—Matter of law—Substitution of party to suit—Special appeal—Act VIII (B.C.) 1869, sec. 14.

Plaintiff sued to recover rents at enhanced rates after notice, and obtained a decree. Defendant appealed on the merits, tacitly accepting the finding of the lower Court that notice had been duly served. On appeal, the Subordinate Judge, of his own motion, took up the question of notice, decided that it had not been duly served, and reversed the decree of the lower Court: *Held*, that the Subordinate Judge was wrong; for, seeing that the defendants had not appealed from the finding of the first Court which declared that there had been good service, it might fairly be presumed that they had due notice of the notice to enhance, until evidence sufficient to rebut that presumption could be shown.

An objection that notice of enhancement has not been properly served is not an objection purely of law, but a mixed objection of law and fact which may be impliedly waived by the conduct of the parties.

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CHATTOPADHYA.

Statement.

Chunder Monce Dossee vs. Duroneedhur Lahoory, 7 W. R. and distinguished.

It is not correct to substitute the assignee of the original plaintiff on the record, the proper course being to add him plaintiff if he desires it. Where, however, the substitution before judgment in the first Court, and was not objected there is no allegation that any party had been prejudiced the error will not be considered in special appeal.

Juddoputtee Chatterjee vs. Chunder Kant Bhattacharjee, 309; *Sahab Roy vs. Chonee Singh*, 9 W. R., 487; considered explained.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Dacca, reversing that of the Moonsiff of Moonsheegunge.

In this case the plaintiff sued for enhancement of pursuance of notice to that effect served on the defendants are seven in number, members of a joint Hindu family service on defendant No. 1 was personal, and the peon, at their request, delivered the notices intended defendants Nos. 6, 7, to the defendant No. 1. The service also delivered to the defendant No. 1 the notices for defendants Nos. 2, 3, 4, 5. After the institution of the suit, the plaintiff was substituted on the record for the original who had assigned his interest in the land to the former. The remaining facts are sufficiently set forth in the judgment of the High Court. The Court of First Instance gave judgment in favor of the plaintiff, which was reversed on appeal by the Subordinate Judge on the ground, not taken in appeal, that the service of the notices was bad. Plaintiff then brought this special appeal.

Baboo Grija Sunker Mojomdar, and Baboo Bhoolal Dass, for Appellant.

Baboo Doorga Mohun Doss, and Baboo Aukhil Chatterjee, for Respondents.

The judgment of the Court (1) was delivered by

AINSLIE, J. AINSLIE, J. :—

The plaintiff is the special appellant. The suit was

(1) AINSLIE, J.

rents at enhanced rates after notice. The Moonsiff at there had been due service of notice, and gave the a decree for a portion of his claim. The defendants, but did not question the finding of the first Court on of notice. The Subordinate Judge, however, relying on 334 of Act VIII of 1859, went into this question, that there had not been a sufficient service, and that re to prove this point must necessarily be fatal in a enhanced rents after notice. The notice was admittedly served on defendants Nos. 1, 6, 7, but he held that ice on defendants Nos. 2, 3, 4, 5, was defective, inas- it had not been effected as directed by section 14, Act 1. C.) of 1869. The notice was delivered to defendant n account of the other defendants, but excepting in the Nos. 6 and 7, without their proved consent or knowledge. tions raised on this special appeal are two, namely— ther the Subordinate Judge was justified in going into on of notice at all, when the defendants had accepted the of the first Court; and, second, whether it was necessary ovice separately on every person interested in the tenure his name is recorded in the zemindari serishta or not. ubordinate Judge has cited in support of his decision ut reported in 7 W. R., 2—*Chunder Monee Dossee onsedhur Lahoory*, but there is a marked difference the cases. In that case the defendant had succeeded e Court in defeating the suit by the plea of insuf- vice of notice, and this judgment of that Court was on appeal and restored in special appeal, the point uested in every stage of the case. It seems to have ended that the judgment of the lower appellate Court an opinion entertained by the Judge, that there had n personal service of notice in some way or other, as overruled on the ground that the words used were to warrant a conclusion that the Judge meant to the notice really reached the hands of the tenant in How the decision might have been varied if this had y found by the lower appellate Court, I need not

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AINSLIE, J.

In this case we have the fact that the notice certainly three of the defendants in good time, and that it is quite that, although the copies intended for defendants Nos. 2 (in the first instance delivered to defendant No. 1, they n been put into the hands of those defendants in good t vided the notices did reach their proper destination in g I do not know that it is material that they did so thr hands of the co-defendant instead of direct from the C peon. Now, seeing that the defendants had accepted th of the first Court, which declared that there had b service, it might fairly have been presumed that they b cient notice of the claim to enhance. The Subordinate does not rely upon evidence inconsistent with this pres he simply overlooks the evidence afforded by the cond parties, and assumes, as a fact, that defendants Nos. 2 to received the notices in due time. If I rightly under he justifies resting the decision on this ground, und 334, by the consideration that this, being a question of could properly be taken at any stage of the process there I think he was in error. It was not a question alone, but a mixed question of law and fact; he w piding on facts found by the first Court and accept parties, but on a new finding of fact by himself on the which on this point he was never asked to review, and already pointed out, he only looked to the evidence o formal service of the notice, and did not consider w might not reasonably be presumed from the cond parties that the notices did in fact reach those to w were addressed, and that they had accepted them as d. The plea of non-service is one which may be waived; i positive law as in the case of a plea of limitation req Court to enquire into it independently of the ad parties. I think the Subordinate Judge was in error ing out the suit in this preliminary ground. The cas down that he may dispose of the questions raised in t of appeal.

It was contended by the respondent that the appella maintain the suit, he having been substituted as ph

tution. The judgment in 9 W. R., 309—*Juddoputtee jee vs. Chunder Kant Bhattacharjee*, shows the proper in such a case is to add, but not to substitute, parties. case the Court refused to recognize the substitution, but was somewhat peculiar, the substitution had been made the will of the original plaintiff and distinctly to his co. Another case in 9 W. R., 487—*Saheb Roy vs. Singh*, was cited. This judgment, though professedly in the former, goes a good deal beyond it. It not only wn that the substitution of one plaintiff for another was but declares that it had not even the effect of making party to the suit at all. But the earlier judgment ly indicates that a purchaser of the rights of a plaintiff a *lite* may be added as a co-plaintiff to protect his under the purchase, and it seems to me that where, as in it, it is not alleged that any one has been prejudiced by of the order, the fact that it is irregular, ought not, section 350, to be noticed in appeal. In the case at 9 487, this section is not noticed, and it may be there reasons for not allowing the appeal in the absence of al plaintiff. Further I think that, as the substitution ee before judgment in the first Court, and was not to, it is too late to take the objection now. The case is to the lower appellate Court. Costs to abide the

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AINSLIE, J.



[CIVIL APPELLATE JURISDICTION.]

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March 29.

RADHANATH CHOWDHRY PLAINTIFF

AND

JOY SOONDER MOITRA AND OTHERS . . . DEFENDANTS

Suit for a kabuliati—Questions to be determined—Intervenors

Where a suit is brought for a kabuliati after service of the notice, the first and main question is whether, as a matter of fact, the plaintiff can establish that he or some person from whom he demands put the defendant into possession of all the lands in respect of which the kabuliati is demanded; and the second question is whether the defendant tendered a proper pottah, and is therefore entitled to the correction of the kabuliati.

For the decision of such a suit it is immaterial whether the kabuliati which is demanded belongs in reality to the plaintiff or to third parties; and the Court should not allow the latter to object to the intervenors against the will of the plaintiff.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Rajshahye, affirming that of the Magistrate of Nattore.

This was a suit for a kabuliati at an enhanced rate after notice. The defendant alleged that a part of the lands in respect of which the kabuliati was demanded belonged not to the plaintiff but to third parties, and he objected that they should be made defendants. This was done, and the suit was dismissed. The decision was affirmed, on appeal, by the Subordinate Judge. The Plaintiff then specially appealed to the High Court.

Baboo Kishoree Mohun Roy, for Appellant.

Baboo Ishur Chunder Chuckerbutty, for Respondents.

The judgment of the Court (1) was delivered by

AINSLIE, J. AINSLIE, J.:—

In the present case it appears to me that it was not necessary to make the intervenors parties. This is a

(1) AINSLIE, J.

buliat. A landowner, suing for a kabuliat by implication, alleges that the defendant is a person who has been put in possession by himself or his predecessor in title, and that he has been holding under his license but without a written agreement. The object of such a suit is to have the terms of the holding reduced to writing, and possibly, as in the present case, to have the rent enhanced after notice duly served. In such a case questions of title between the plaintiff and third parties do not arise; because if the plaintiff succeeds in showing that the defendant has been put into possession by his or his predecessor's license, it is not in the mouth of defendant to raise any question of title. If the tenant finds the title of his lessor is doubtful, he may of course object to hold under him, and may, therefore, refuse to give a kabuliat; but he can only do so on resigning the land. So long as he continues to hold the land under the plaintiff he is not in a position to question his title, and if the pottah tendered to him is a fair and proper pottah, he is bound to give the plaintiff a kabuliat. If, on the other hand, the defendant succeeds in showing that he holds any part of the lands otherwise than by the license of the plaintiff, as the pottah offered cannot be divided, the tender of the pottah is not a tender of which the plaintiff ought to have tendered, and the ryot is bound to give a kabuliat for lands of which he obtained possession from other parties. So that whether the possession of the plaintiff at the time that the defendant was let into possession was a rightful or wrongful one, is wholly immaterial for the purposes of such a suit as this. But while the first Court seems to have gone into the question of whether the lands were let into the possession of the defendant by the plaintiff or by other persons, the Subordinate Judge seems to me to have refused altogether to try that question, and to have held as a mere matter of law irrespective of the facts of the case, that, whereas the plaintiff admits that there are counter claims in respect of lands for which he is seeking a kabuliat, he is not entitled to maintain this suit. The view of the law appears to me to be

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AINSLIE, J.

The first and main question to be tried in such a suit as this is whether, as a matter of fact, the plaintiff can establish that he

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 Judgment.
 AINSLIE, J. or somebody from whom he takes title, put the defendant possession as a tenant of all the lands in dispute; and the question is, whether he has tendered the defendant a pottah, and is therefore entitled to a corresponding kabuliati. case will go back to the Subordinate Judge to be re-tried between the plaintiff and the original defendant on these issues. Costs will follow the result.

The intervening defendants have not appeared in this case. It seems to me that the case between the plaintiff and the defendant is altogether independent of the question of costs between the plaintiff and the intervenors. I think the proper course will be to direct that their names be struck from the record, and that they be made to bear their own costs.

[EXTRAORDINARY CRIMINAL JURISDICTION.]

April 18.

IN THE MATTER OF THE EMPRESS OF INDIA vs. SAHA

Section 263, Code of Criminal Procedure—Verdict of Jury disapproved—Sessions Judge—Voluntarily causing hurt—Section 321, Indian Penal Code—Hurt intended for one person and carried to another.

When a man strikes a woman with a child in her arms on the head of her person which is close to the head of the child, it must be presumed that he knew that he was likely to strike the child and endanger its life. Such an act amounts to voluntarily causing hurt to the child, though it may not have been the intention of the person to strike the child.

When a Sessions Judge submits a case under section 263, Code of Criminal Procedure to the High Court, because he disagrees with the verdict of the Jury, acquitting the prisoner, he is required to state the exact offence of which, in his opinion, the prisoner has been convicted.

CASE submitted by the Sessions Judge of Patna under section 263, Code of Criminal Procedure, because he disagreed with the verdict of a majority of the jury (three out of five) acquitting the prisoner.

accused. The facts sufficiently appear in the letter of the Sessions Judge and the judgment of the High Court.

The Sessions Judge submitted this case with the following remarks :—

The main charge against the prisoner was that, whilst he was striking a woman labourer by name Chetya, with a heavy leather belt, two of the blows alighted on the head of her baby which she had at her breast. Its skull was broken, and it died then and there. I told the jury pretty plainly that, in my opinion, the charge charged was proved, and there was no reason to suppose that the case had been got up. Although the witnesses, mostly men, and of a very low and ignorant class, had not spoken the truth on some points, there was no ground whatever for disbelieving them as to the main facts. I also told the jury that it was proved that the child was killed whilst in the arm of Chetya; they said, if they believed the evidence for the prosecution, to convict the prisoner of having assaulted Chetya as well as the baby, or to convict him of both assaults. It seemed clear that the story for the prosecution should be accepted or rejected as a whole. The jury, after having retired for half an hour, delivered, through their foreman, an unanimous and clear verdict to the effect that Chetya had been assaulted by the prisoner, but said nothing about the baby, and the foreman seemed unable to tell what was the opinion of the jury respecting it. I, therefore, directed them to retire and let me know what they had to say about the assault on the child. After an absence of fifteen minutes the jury returned, and the foreman announced that three of the jury did not believe that the child had been killed by the prisoner, and that two thought that the prisoner had killed the child, and was guilty of culpable homicide. I am at a loss to understand how the three jurymen, after having found that Chetya had been assaulted by prisoner, could have held, they have, that the child was not killed by the prisoner. Even the defence admits that the child was in the mother's lap just where it died, and it seems obvious that the whole story for the prosecution is true. I am inclined to think that the three jurymen have been influenced by the ungrounded fear that, if the prisoner were found guilty by them of killing the child, the

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1878 sentence imposed on him would necessarily be a very a
 EMPRESS OF one."

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Baboo *Jugdamund Mookerjee* (Junior Government Pleader
 the prosecution).

Judgment.

Mr. R. E. Twidale, and Mr. Sandel, for the Prisoner.

The following judgment of the High Court (1) was delivered by

MARKBY, J. MARKBY, J. :—

The facts of this case do not appear to be susceptible of doubt. The prisoner was employer of a man named Behari, wife Chetya, and his sister Foolcoomaree. Some disagreement appears to have arisen as to the payment of the wages of this family. In the morning in question, the prisoner was in the house of Behari and called Chetya, the wife of Behari, Foolcoomaree, his sister, to execute some work on his behalf. They refused, and made use of language which no doubt was disrespectful. Thereupon the prisoner, with the shoes he was wearing, commenced striking Chetya about the head and shoulders. Chetya had at that time a child of a few months in her arms, the head of the child, as she describes it, either upon or close to her shoulder. One of the blows delivered by the prisoner fell upon the child's head, and, as was certain to happen, the child died in consequence.

The prisoner was charged with culpable homicide not amounting to murder of the child, of causing the death of the child by a rash and negligent act, of grievous hurt to the child, and of grievous hurt to the child, the last two charges being added by the Sessions Judge. There was no charge made with reference to assault upon the mother.

The result of the trial was, that three of the jury thought that the prisoner should be acquitted altogether. The other four jurors seem to have thought that the accused was guilty of culpable homicide of the child.

The Judge has told us that he differs from the verdict of the majority who have acquitted the prisoner altogether,

(1) MARKBY and PRINSEP, J.J.

somewhat embarrassed in the matter by this—that he has told us of what crime, in his opinion, the prisoner was guilty. **ling** sections 263 and 464 of the Criminal Procedure Code **ther**, we think that it is the duty of the Judge, in cases like **to** give us his own opinion if he disagrees with the verdict **equittal**, as to the exact offence of which he considers the **mer** is guilty. We think that this Court has a right to **not** from the Sessions Judge his opinion in a case of this **. Nevertheless**, we think we are still competent to deal with **matter**, and the Government Pleader, who has appeared **to us**, has very properly not pressed for a conviction of cul- **homicide**. We are extremely doubtful whether technically **charge** of culpable homicide could be supported, but we **we** are justified upon the facts proved in finding the **mer** guilty of grievous hurt under section 322. There **no** doubt whatever as to the facts of the case, we have no **ion** in finding the prisoner guilty under that section, **standing** that he was acquitted altogether by three of **jury**, probably because they did not fully understand **upon** the subject. No doubt what the prisoner intended **to** inflict some injury upon the mother, and in one sense **not** intend to inflict any injury upon the child at all; **seems** to me that the language of section 321 covers **in** which a man intending to aim a blow at one person **another**. That section says: "Whosoever does any **in** the intention of thereby causing hurt to any person, **in** the knowledge that he is likely thereby to cause hurt **person**, and does thereby cause hurt to any person, is **voluntarily** to cause hurt to such person." The very general **age** of that section was, I think, used expressly for the **se** of covering a case of this kind. I also think that the **er** is also liable for causing grievous hurt. Section 322 **says** that: "Whoever voluntarily causes hurt if the hurt which **tends** to cause, or knows himself to be likely to cause, is **ous** hurt, and if the hurt which he causes is grievous hurt, **is** voluntarily to cause grievous hurt." I think that it is **able** to say when a man strikes a woman with a child **arms**, and strikes her on that part of her person which

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is close to the head of the child, that he does not know it is likely to cause grievous hurt to the child. He must, reasonable being, know that nothing is more probable than the blow which he aims at the woman would fall on the child, that any blow which would fall upon the child's head, be likely to cause such hurt as would endanger the child. This is one of the definitions of grievous hurt, and, therefore in my opinion the prisoner ought to be convicted under section.

Of course the most important matter in this case is, with the punishment which the prisoner ought to undergo. The evidence certainly shows that the prisoner's conduct was violent. There was nothing which could justify his conduct as regards the mother, and to strike a woman with a child tender age in her arms is certainly a most unjustifiable act. I doubt the prisoner never desired to do any injury to the child, but still he has done an act which deserves severe punishment. Under section 325 of the Indian Penal Code he will be sentenced to rigorous imprisonment for two years.

[CIVIL APPELLATE JURISDICTION.]

March 21. LUDDENTONNISSA AND OTHERS PLAINTIFFS
AND
NAJADA KHATOON AND ANOTHER DEFENDANTS

Presumption—Joint Mahomedan Family—Purchase with joint funds.

A Judge is not bound as a matter of law to apply to a Mahomedan family, living jointly, the rules and presumptions which are held to apply to a joint Hindu family.

When a Mahomedan family adopts the customs of Hindu, they do so, subject to any modification of those customs which they may consider desirable, and it must rest with the Judge, who decides each particular case, how far he should apply the rules of a joint Hindu family to the case of any Mahomedan family before him.

Vellai Mira Ravuttan vs. Mira Moidin Ravuttan, 2 Mad. 100.
 plained.

SPECIAL APPEAL from a decree passed by the Second Appellate Judge of Dacca, reversing that of the Moonsiff of Dacca.

In this case the plaintiff stated that, while her husband and co-sharers lived jointly, a 5-annas share of a certain talook was purchased from joint funds; that the *kobala* was executed in the names of Gholam Ali and Nazamut Ali, two of the co-sharers; that all the co-sharers remained in possession of the 5-annas share by enjoying the profits down to the year 1274, when the family separated; that after the separation the defendants, the widows of Gholam Ali and Nazamut Ali, dealt with the 5-annas share as their own, and granted an *ijara* thereof to a third party, who was also made a defendant. Plaintiff sued to establish her right to a share in the talook. She obtained a decree in the Court of First Instance, which was reversed on appeal, the Judge holding that the plaintiffs had failed to show that they had enjoyed the rents and profits of the talook prior to the separation.

Plaintiff appealed to the High Court, on the ground that the talook, having been purchased at a time when the family was joint, should have been held to be purchased with joint funds if the contrary were shown.

For Doorga Mohun Dass, for Appellants.

For Taruck Nath Palit, and Moonshes Serajal Islam, for Respondents.

The judgment of the High Court (1) is as follows:—

It is impossible to say that the judgment of the lower appellate Court in this case was erroneous in law, unless we go to the length of saying that a Judge is bound as a matter of law to apply the rules of a Mahomedan family, living jointly, all the rules and presumptions which have been held by this Court apply to a joint Mahomedan family. Now we are not prepared to go to that length. If a Mahomedan family adopts the customs of Hindus, it may be subject to any modification of those customs which the members may consider desirable, and it must rest with the Judge, in each case, to decide each particular case, how far he should apply the rules of Hindu joint family to the case of any Mahomedan family that comes before him.

In regard to the case quoted from 2 Mad., 414—*Vellai Mira*

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v.
NAJADA
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Statement.

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Judgment.

Ravuttan vs. Mira Moidin Ravuttan, we have no reason to doubt that it was a perfectly proper decision with reference to the facts then before the Court. The Court does not then say anything contrary to what we have just now laid down as the law in this part of the country. Although in that particular case the Court, sitting as a Court of Regular Appeal, did apply the presumption of a manager on the part of a Mahomedan family, the same presumption as applies to the manager of a Hindu joint family, they nowhere say that must be done in all cases. We cannot say that because the Subordinate Judge did not apply that presumption to this case his judgment is erroneous in law. We cannot, therefore, interfere with his judgment on special appeal. The appeal must be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

March 23. RAM COOMAR PAL AND OTHERS DEFENDANTS
AND
JOGENDER NATH PAL PLAINTIFF

Joint Family Property—Transfer of property to an Idol—Partition—Endowment—Presumptive Evidence.

Partition is an incident of property in India, and if the property of the several members of a joint family, and has been actually transferred to an idol, the several members have the right to partition.

Property not actually transferred to an idol, but only subject to trust in its favour, is subject to partition.

Where, in a suit for resumption of certain lands, a material question was raised as to whether the lands were the property of an idol, and the defendants declared it to be, *Held*, in a subsequent suit by these defendants for partition, that such statements would be presumptive, but not conclusive, evidence that the property had been devoted to an idol.

Sonatin Bysack vs. Sreemutty Juggulsoondree Dossee, 8 Moore's P. & F. App., 66; and *Radha Mohun Mundul vs. Jadomoni Dossee*, 10 Moore's P. & F. App., 369, cited.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Hooghly, affirming that of the Second Moonsiff of Andah.

lit, for Appellant. Baboo Hem Chunder Bannerjee, and
Bykunt Nath Paul, with him.

Baboo Ashootosh Dhur, Baboo Rash Behary Ghose, and Baboo
Akhenath Mitra, for Respondents.

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NATH PAL.
Judgment.

The facts of the case are sufficiently set forth in the judgment
of the High Court (1) which is as follows :—

In this case the suit was brought for a partition. The plaintiff
alleged that the common ancestor of the parties and his five sons
acquired certain properties; that after his death his five sons
divided among themselves, taking certain land amounting to
one bighas each for their own private expenses; that the
remaining lands they held in *ijmali* among themselves; that one
of them became the manager who made the collections of the
land and from the profits thereof paid the expenses of the
land, &c., festivals, and the worship of the idols, all of
which were patrimonial. The balance of the money they divided
among themselves." The substance of the defence, so far as we
have to advert to it now, is that the whole of the land under claim
was the property of the idol.

The Moonsiff, who went very fully into the matter, came to the
conclusion that 94 bighas and 6 cottas of the land were debutter
land, and were not partible; and, as there is no complaint now
of that part of the decision, we must assume that the
Moonsiff came to the conclusion that the defendants had, in
division of that quantity of land, made out their allegation that
it was the property of the idol. As to the rest of the property,
the exception of some land which has already been divided,
the Moonsiff found that it was the joint family property, and
decree for partition. The Subordinate Judge has affirmed
the decision.

Appeal has been taken to that decision in special appeal,
as to that part of the property which was found by the
Moonsiff to be only *ijmali* property, that by the plaintiff's own
pleading contained in the plaint it is shown that this property
cannot be made the subject of partition; and the paragraph
of the plaint upon which the special appellant relies is that to

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which we have already referred, viz., where the plaintiff how the properties were disposed of when the family is. It is contended that when that admission is once made assume that the property was to this extent transferred to the idol. It seems to us that this is carrying the statement of the plaintiff considerably beyond what would be the reasonable construction of the plaintiff's statement. He nowhere states that the property was given to the idol, whilst he says that each member of the family had an interest in the surplus profits.

The case is somewhat like the case of *Sonatun Bysad* cited in 8 Moore's Indian Appeals, p. 66. There the will contained a statement that the property was given to the idol, nevertheless, relying mainly upon a subsequent clause in the will by which it was declared that the members of the family of the testator will have an interest in the surplus, the Privy Council came to the conclusion that the property remained in the family and was not transferred to the idol, and that it was subject to a trust in favour of the idol. It is argued that we think correctly, that all these cases must depend upon the intention of the parties. Nevertheless, this judgment of the Privy Council is a guide to us as to what our decision should be in this case: and it seems to us clearly to indicate that the plaintiff should be going considerably beyond what the plaintiff's complaint if we were to say that it contains an admission that this land is the property of the idol. We also think it is in accordance with the decisions that, unless the property is transferred to the family and dedicated to the idol, the partition ought not to take place. There may be some inconvenience in carrying out the worship of the idol should the property be partitioned, nevertheless partition is an incident of property in this case if the property is the property of the several members of the family and has not been actually dedicated to the idol, that the authorities show that the several members have a right to partition. A strong case in favour of the right to partition is that of *Radha Mohun Mundul vs. Jadoomonee Dassee*, 369, where the claimant of a share admitted that the property was in a sense debutter property. She claimed, nevertheless,

bait she had a right to a separate share of the debutter party, and her claim was allowed. Here, the property could really be called debutter property at all. It is, as in the case *Sonatum Bysack*, the private property of the family, subject to a trust in favour of the idol. Therefore, upon the facts found by the Court below, I think that the decree for a partition was right.

But a difficulty has occurred as to one passage in the judgment of the Subordinate Judge. It appears that some thirty years ago the Government took proceedings for resumption of the property. As I understand, this property would not have been resumed if it could have been shown to have been the property of the idol. It was, therefore, the interest of all the members of the family to make out that it was so, and all the members of the family then joined together in making this representation to the persons who were making the inquiry on behalf of the Government as to the nature of the interest of the family in the land. Undoubtedly those statements, whatever their value may be (and we cannot enter into that in special appeal), were made as between the different members of the family, now one party alleges that the land is the property of the idol, the other party alleges that it is not so. Unfortunately, the Subordinate Judge seems to have taken upon himself, for some reason or other, to say that those statements were not evidence in the case. We are informed that we have no reason to doubt that no question was raised before him as to those statements being evidence. Nevertheless he does say so, and the only real doubt in the matter is, whether he really means what he says or whether he means to say that they are not conclusive evidence. If he means to say that they are not conclusive evidence he is right, but we cannot put that construction upon what he says. He says that those statements cannot be used as evidence, and we think we should be taking too great a liberty with his language if we were now to say that this is not what he means. If the Subordinate Judge had been any longer in the Civil Service we should have made some enquiry about it. Fortunately, he has ceased to be so, and, therefore, we can make no further enquiry in the matter.

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Judgment.

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JOGENDRE NATH PAL
Judgment.

All that we can do is to remand the case. We have explained what the law applicable to this case is. The will be re-heard, and the Subordinate Judge will determine whether or no he agrees with the view taken by the M that the lands, other than the 94 bighas and 6 cottas at Bhattee land 80 bighas, were not dedicated to the idol. If they were dedicated to the idol, and ceased to be the property of the family except otherwise than as representing the idol, then the lands are not partible. On the other hand, if he finds that they remained as the property of the several members of the family, subject to a trust in favour of the idol, and that only the surplus of these lands were dedicated to the worship of the idol, and the surplus proceeds were distributed among the members of the family, then the decree will stand.

There is also another matter which can be set right on remand. It is complained before us that the decree, as it now stands, is not correctly drawn up. That decree being set aside it is ordered that the Subordinate Judge should pay attention to this, and on the case being heard on remand, he will draw up a new decree which will carry out fully and clearly the directions of the court. Costs will abide the result.

[CRIMINAL REFERENCE.]

THE MATTER OF CHOOHAI TELEE . . . PETITIONER.

1878

April 8

*False charge—Preliminary Inquiry—Section 211, Indian Penal Code—
Section 471, Code of Criminal Procedure.*

A petition was presented to the Joint Magistrate charging the police with having made a false report of an investigation which they had been directed to make at the instance of the petitioner. The Joint Magistrate, after reading the police report, rejected the petition, and directed the petitioner to be prosecuted under section 211 of the Indian Penal Code for having made a false charge: *Held*, that the Joint Magistrate should not have made the order without first instituting an inquiry into the truth of the complaint, such as is required by section 471 of the Code of Criminal Procedure.

Queen vs. Gour Mohun Singh, 16 W. R., 44; and in the matter of *Sayed Nisoor Hossein*, 26 W. R., 10; considered.

THIS was a reference from the Sessions Judge of Tirhoot, the facts of which are as follows:—

One Choolhaie Teelee, on the 4th of December 1877, lodged a complaint in the Foujdari Court, that his dhan crop had been cut by Brijbehares Singh and others, and praying that the matter might be enquired into, and the accused punished. The Joint Magistrate, Rai Ishree Pershad Bahadoor, by whom the complaint was received, examined the complaint, and referred the matter to the police for investigation. Even though the police reported that the charge was false, on which the complainant put in a petition accusing the police of having made a one-sided enquiry, and praying that the witnesses named in his petition of complaint might be summoned and the case proceeded with. The Joint Magistrate of Mozufferpore, however, on the 4th of January 1878, after perusal of the police report, refused to accede to complainant's request, and ordered the petitioner to be prosecuted under section 211, Indian Penal Code, the police being directed to send in the necessary proof. On the 11th of January, the prosecutor and witnesses appeared, and the Joint Magistrate made over the case to the Deputy Magistrate,

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 CHOOBHAI
 TELEE,
 Petitioner.
 Statement.

asforenoted, for trial, under section 211, Indian Penal Code. Previous, however, to any decisions being arrived at, Choo Telee petitioned this Court, that all the records might be examined for and a report submitted to the High Court, with a view to the Joint Magistrate's order of the 4th of January being quashed on the ground of irregularity and illegality. I am of opinion, that the Joint Magistrate acted *ultra vires* in summarily rejecting the complainant's petition asking to have his witnesses examined. That he (the Joint Magistrate) ought to have complied with the prayer contained in the said petition and made further inquiry to satisfy himself that the proceedings of the police were as stated by complainant, partial and improper, before dismissing him under section 211, Indian Penal Code. (See *Q. Gour Mohun Singh*, 16 W. R., Cr., 44; *Sayud Nisser*, petitioner, 25 W. R., Cr., 10.)"

Judgment.

The following judgment was delivered by the High Court. The Deputy Magistrate, after examining the complainant, having reason to distrust the truth of the complaint, ordered inquiry by the police before issuing any process. The report was that the complaint was false, and the Deputy Magistrate then dismissed the complaint. The complainant then filed a petition to the Joint Magistrate of Mozufferpore accusing the police of misbehaviour and asking to have his case tried by the Joint Magistrate, after reading the police report, rejected the petition and directed the complainant to be prosecuted under section 211 of the Indian Penal Code for having made a false complaint. The complainant then petitioned the Sessions Judge, who has submitted the case for our orders, as, in his opinion, that the order of the Deputy Magistrate dismissing the complaint was not in law, which would consequently vitiate the other proceedings ordered by the Joint Magistrate.

We observe, first, that the Deputy Magistrate, Ram Pershad, is a Magistrate of the first class, and therefore the order passed by him under section 147 of the Code of Criminal Procedure, dismissing the complaint would, under section 211, be subject to the orders of the Sessions Judge.

We find nothing contrary to law in the Deputy Magistrate's

(1) MARKBY and PRINSEP, J.J.

r, which is one in accordance with sections 146, 147, of the Code of Criminal Procedure. The decision in 16 W. R., 44—*vs. Gour Mohun Sing*, quoted by the Subordinate Judge, is against this view of the law, and the report of the case in 17 W. R., 10—*Sayad Nisser Hossein*, does not give the facts sufficiently for us to determine how far that case is in point.

The Joint Magistrate's order is, however, open to objection. It is not clear what authority he had to pass it, for the Deputy Magistrate apparently is not a Court subordinate to him within the meaning of section 468; but, however that may be, it does not appear that he made any preliminary inquiry such as is required by section 471, and such as in the present instance would be most likely to substantiate the correctness of the police report. We therefore, direct that all further proceedings on the Joint Magistrate's order of the 4th of January 1878 be stayed.

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CHOOBHAI
TELE,
Petitioner.
Judgment.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF CHUMMUN SHAHA (CONVICT.)

April 30.

Sections 224 and 346, Code of Criminal Procedure—Admission of accused—Conviction—Examination irregularly recorded.

A Magistrate is competent, under section 224, Code of Criminal Procedure, to convict an accused person, on his admission of his commission of the imputed offence. The legality of a conviction, so obtained, does not depend on the regularity of the record of any examination afterwards taken.

It was referred by the Sessions Judge of Bhaugulpore to the Court, as a Court of Revision, that the order of the Magistrate convicting Chummun Shaha might be set aside as contrary to law.

The facts of this case appear sufficiently from the letter of the Sessions Judge, which was to the following effect:—

The only evidence, if I may so call it, recorded against Chummun Shaha is what purports to be a confession before the Deputy Magistrate. This document does not bear the certificate required by section 346, nor the signature or attestation of the accused. The Deputy Magistrate has not even examined the complainant in

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 SHAHA,
 Convict.
 —
 Judgment.

"Section 216, Code of Criminal Procedure, Explanatic directs that in the trial of warrant cases by the Mag 'the charge shall be prepared as soon as the Magistrat opinion that a *prima facie* case has been established again accused person, although the whole of the evidence f prosecution may not have been completed.' Section 324 same Code provides that, 'if an accused person admits the mission of an offence before a Court competent to try h such offence such Court may convict him on his own adm I doubt very much whether the Legislature meant Magistrates the power of framing a charge merely on mission of a prisoner where a *prima facie* case has otherwise made out; but in this particular instance, as the ner's confession is attested neither by the certificate requ the law, nor by the prisoner's own signature, I think that has been illegally conducted, and that a new trial should dered. This I have no authority to order, as Chummun Si not appealed.

"Bechu Singh was tried at the same time with Ch Shaha. His confession is also unsigned, but it bears the required by the law. Bechu Singh appealed, not on the of the irregularity of the proceedings, but on the repr that the sentence was excessive. The papers are an order that the whole case may be before the Court.

The following judgment was delivered by the High Court.

It was unnecessary for the Magistrate to record any of Chummun Shaha; he was competent, on the adm Chummun Shaha, to sentence him without any further roction 324, Code of Criminal Procedure). Section 346, of the Sessions Judge relies, refers to an examination m trial, so that any irregularity in the mode of record c affect the propriety of this conviction.

As regards the other convict we express no opinio Sessions Judge should deal with his case, which is now c before him; but we would observe that he should not alle larities which can be remedied to interfere with the courser

[FULL BENCH.]

LA NOWBUT LALL PLAINTIFF;
AND
LA ROWSHUN LALL AND OTHERS . . DEFENDANTS.

1878
June 3.

Mahomedan Law—Shuffa—Pre-emption—Co-sharers.

Under the Mahomedan Law one co-parcener has no right of pre-emption against another.

Mohasker Lall vs. Christian, 6 W. R., 250; *Teska Dhurn Singh vs. Mohur Singh*, 7 W. R., 280; *Roshun Mahomed vs. Mahomed Kubeen*, W. R., 150, cited.

THIS was a suit for possession of a share in a mouzah by of a right of pre-emption. In the mouzah in which the in suit is situate, plaintiff and defendant No. 3, Jewan each owned a 4-pie share, and the defendant No. 2, Tirput owned a share of the same extent up to the 12th of January

This is the share in suit. On that date he sold it by a to defendant No. 1, Rowshun Lall, and on the 19th of ary following, Rowshan Lall again sold it by a similar deed andant No. 3. The moonsiff decreed one-half to the plaintiff, e half to Jewan Lall, and against that decision both parties ed. It appeared that the plaintiff only heard of Rowshun's rom Tirput, on the 7th of March 1875, that is, after the the second *bynama*, and on that date Jewan Lall was in ion as proprietor of this share. The Judge held that no option could be enforced against Jewan, being a co-sharer, e dismissed the suit.

plaintiff specially appealed to the High Court, when the as referred by MITTER, J., to a Full Bench in the following

this case two objections have been taken to the judgment lower Appellate Court: first, that the District Judge has ed the question whether the defendant Jewan Lall is a er in the *putti* of which the share in suit is a component and, secondly, that admitting that Jewan Lall is a

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co-sharer, the plaintiff is entitled to a partial decree. The objection does not appear to me to be tenable. It is ad that the plaintiff has adduced no evidence upon that while on the other hand the defendant has adduced evidence establish that he is a co-sharer in the *putti* in question. these circumstances, the Courts below were right in treating defendant as a co-sharer in the *putti* of which the dispute is a part. I am of opinion, therefore, that I ought not to to this objection.

"As regards the next objection, it appears to me that cited by the Moonsiff is in conflict with that of *Mohesher Christian*, 6 W. R., 250. There being this conflict in decisions of this Court, I think it right to refer the case to Bench. The question referred is, whether under the Mah law one co-parcener has a right of pre-emption against co-parcener?"

Argument.

Baboo *Durga Pershad*, for Appellant, cited *Hamilton's* vol. 3, bk. 38, ch. 1; *Bailie's Digest of Mahomedan Law*, Ed. of 1865,) ch. 6, para. 2.

[During the argument Mr. Justice AINSLIE inquired plaintiff gained a right of pre-emption against Jewan Lall the preliminaries necessary for claiming the right come to him? Mr. Justice JACKSON said it did not appear right was completed against Rowshun; nor that the made any complaint against Jewan, who came in as a par section 73 of Act VIII of 1859. The learned pleader plaintiff intimated that, supposing the right was against Rowshun that would be sufficient as against Jewan should be taken as his representative. The CHIEF JUSTICE that the Court would not recognize such a contention, but insist that the preliminaries should have been completed Jewan's case also. If the plaintiff had not heard, as means of hearing, of the sale to Jewan, he might have demand in Court when Jewan intervened.]

Baboo *Grija Sunker Mozoomdar*, for Respondent *Mohesher Lall vs. Christian and others*, 6 W. R., 250.

judgment of the Full Bench (1) is as follows :—

are of opinion that by the Mahomedan Law one co-parcener has no right of pre-emption as against another co-parcener.

appears to be no reason, either upon principle or equity, why the right of *Shuffa* should exist as between co-parceners; and the rule as laid down in Hamilton's *Hedaya*, vol. 1, chap. 1, appears to have been misunderstood in this. That rule merely prescribes that any one partner (or owner) of a property has a right of *Shuffa* as against a partner who purchases a share from his co-partner; and does not mean that the right exists as between co-partners, who may sell shares from one another. The object of the rule, as laid down in that chapter and in chapter 3, is to prevent the annoyance which may result to families and communities by the introduction of a disagreeable stranger as a co-parcener or neighbour. But it is obvious that no such annoyance can result from a sale by one co-parcener to another. The only effect of such a sale would be to give the purchaser a larger share in the joint property than he had before, and perhaps larger than the other co-parceners have.

The only authorities in this Court, to which our attention has been directed, are entirely in favour of this view. (See *Moheshkur Christian*, 6 W. R., 250, and *Teeka Dhurn Singh vs. Singh and others*, 7 W. R., 260). The case of *Roshun and others vs. Mahomed Kubeen and others*, 7 W. R., decided by Justices KEMP and MARKBY appears, when the facts are properly understood, to have no application at all to the questions before us. We find from the record of that case that the true state of facts was this: One out of three co-parceners had sold his share to a stranger. One of the other co-parceners had exercised the right of *Shuffa* against the stranger and obtained the sale of the share to himself; and the only question in the case was, whether the remaining co-parcener had a right to participate in the purchase with the co-parcener who had obtained it.

We therefore decide the question referred to us in the negative, and dismiss the special appeal with costs.

GARTH, C.J., JACKSON, MARKBY, AINSWIE, and MITTER, J.J.

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Judgment.

[CIVIL APPELLATE JURISDICTION.]

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March 6.

LAKHPUTTY THAKOORANI. . . . DECREE-HOLD

AND

RAJA LEELANUND SINGH JUDGMENT-DEBTOR

*Privy Council Decree—Execution—Rate of Exchange—Receipt in,
Estoppel.*

A obtained a decree against B in the Privy Council for the sum of £213-10. A applied to the High Court to direct execution of the decree for the sum of Rs. 2,500-1, being the equivalent of £213-10 at the then rate of exchange. This application, together with the Privy Council decree, were sent down to the lower Court, where execution was directed for the equivalent in rupees of £213-10, taking the rupee as equivalent to two shillings. This sum was paid to the decree-holder, who gave a receipt in full. *Held*, that under the circumstances, the debtor was not bound by the receipt in full; and that he was entitled to the further sum of Rs. 365-1 which the judgment-debtor had paid to the Court.

REGULAR APPEAL from an order passed by the Subordinate Judge of Bhaugulpore.

Baboo Bhowany Churn Dutt, for Appellant.

The Respondent did not appear.

The facts of the case sufficiently appear from the statement of the appellant and from the judgment of the High Court (1), which is as follows:—

The papers have now been read to us in full; and it appears that the appellant before us, in his application to the High Court for execution of the decree of Her Majesty in Council, prayed for the amount due to him to be, at the current rate of exchange, about Rs. 2,500, and this prayer with the original decree was sent down for execution. It is stated in the petition for appeal that the Court below, and not denied by the Subordinate Judge,

(1) JACKSON and CUNNINGHAM, J.J.

amount was cut down by some report of the *Sherishta* to be an amount of only Rs. 2,135, which is evidently the supposed equivalent of £213-10, the exchange being assumed at par. In this view of what was due to him, the petitioner was induced to accept that sum as payment in full of his debt under the decree, July 1876. In November he went before the Court and presented that by a mistake the difference between the amount paid and what he had claimed originally, viz., Rs. 2,500, being the difference of exchange, had not been paid to him, and he asked for that amount. The judgment-debtor paid the amount to the Court, but objected to its being taken out by the decree-holder on the ground that he has already given a receipt in full. Regarding the circumstances under which that receipt was given, we think that the decree-holder ought not to be bound by it, but ought to receive that to which he is fairly entitled, viz., the equivalent of £213-10 according to the rate of exchange at the time. We allow no costs in this appeal.

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THAKOORAM
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RAJA LEEHA-
NUND SINGH.
Judgment.

[CIVIL APPELLATE JURISDICTION.]

MAGNAGHTEN AND ANOTHER DEFENDANTS;
AND
DEKAREE SINGH PLAINTIFF.

March 20.

*Concern—Mortgage—Foreclosure—Mortgagee's liability for rent—
Mortgagee in possession.*

The mortgagee of an indigo factory foreclosed and took possession of the concern, in the month of Jeyt 1282. The rents due from the ryots for the year 1282 became due at the end of Jeyt 1282, and were collected by the mortgagee: the rents for 1282 due to the landowners from the owners of the indigo concern also became due at the end of Jeyt 1282. *Held*, that the mortgagee in possession was liable for them.

SPECIAL APPEAL from a decree passed by the first Subordinate Judge of Bhaugulpore, modifying that of the Moonsiff of Boocrai.

This was a suit for arrears of rent based on a *kabuliat* executed on the 11th of December 1869, by Pores Nath Nundy and Fitzpatrick, the owners of the Paigamberpur Indigo concern,

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 Judgment.

of which the land formed part. Pores Nath Nundy sold share of the concern together with the *dena-powna* to Fitzpatrick. Afterwards Fitzpatrick mortgaged the whole concern with power to collect outstanding balances, &c., to Glad and Ogilvy, of Calcutta, who transferred it to the defendant naghten. The mortgage was in the English form, and naghten foreclosed and took possession in the month of 1282 F.

The rent due to plaintiff for 1282 became due at the Jeyt, after Macnaghten took possession of the concern; it was proved that Macnaghten sued for and got decrees against several of the ryots for the rents of 1282. The Moonsiff's judgment said that Macnaghten did not deny his liability as representative of Fitzpatrick for all *dena-powna* connected with the factory, while the Subordinate Judge said that Macnaghten did not admit he had purchased the concern with outstanding *powna*. The suit was brought against Macnaghten, as heir of Pores Nath Nundy, and in both the lower Courts a decree was given against Macnaghten alone, who then appealed to the High Court.

Collis, for Appellant. *Mr. Morgan* with him.

Baboo Aubinash Chunder Banerjee, for Respondent.

The judgment of the High Court (1) is as follows:

We have no doubt in this case that the judgment of the appellate Court is substantially correct. It appears that the result of an assignment by the mortgagor Mr. Fitzpatrick to the defendant special appellant, has placed himself in the position of actual ticcadar of the ticca in question, and has been in possession and occupation of it from the month of Jeyt 1282. It was found by the Court below that the rents of that year were due at the end of Jeyt, that is to say, the month in which the defendant took possession, and not earlier, so that the defendant and no one else has been in a position to collect the rents of that year. The plaintiff, therefore, does not and cannot stand upon the contract between Mr. Macnaghten and the mortgagor, but that is not before us, but upon what has taken place in possession.

(1) JACKSON and CUNNINGHAM, J.J.

at contract, and on Mr. Macnaghten's own act in taking possession and collecting rents from the ryots. It is said that there is nothing to show that Mr. Macnaghten collected the whole of the rent. I do not think the plaintiff was bound to call the whole of the tenants into the witness-box to show that Mr. Macnaghten collected from every one of them, but if a considerable number of them had been called, the Court might fairly infer under the circumstances that he had collected or might have collected them all. That being so, according to the law of this country, a liability seems to arise on the part of Mr. Macnaghten, who has enjoyed the rents and profits, to pay to the superior landlord. I think therefore that Mr. Macnaghten was liable for the rents of 1282. The appeal will, therefore, be dismissed with

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SINGH.

Judgment.

[CIVIL APPELLATE JURISDICTION.]

DA PROSAD GANGOOLY AND OTHERS . DEFENDANTS;

March 25.

AND

ICK CHUNDER BHUTTACHARJE . PLAINTIFF.

for share of Rent—Void Attachment—Alienation made during Attachment—Act VIII (B.C.) of 1869, sections 64 and 65.

Where one co-sharer obtains a decree for money due to him on account of his share of the rent of an *ijara*, and in execution of that decree attaches, in the first instance, the immoveable property of his co-sharer, such attachment is void, and will not invalidate a conveyance of the property by the judgment-debtor made during its continuance. It is not unless and until all the moveable property of the judgment-debtor has been sold, and the sale proceeds are found insufficient to satisfy the decree, that the judgment-creditor can proceed under section 64 or 65, Act VIII (B.C.) of 1869, to seize and sell the immoveable property of his debtor.

CIVIL APPEAL from a decree passed by the Second Subordinate Judge of Rajshahye.

There was a regular suit instituted under the provisions of Act II of 1859, section 246, for possession of land. It was found that the property in dispute had previously belonged to Mr. Phillippe, and that, on the 4th of September 1872, it

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 PROSAD
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 v.
 TARUCK
 CHUNDER
 BRUTTA-
 CHABJE.

Statement.

was attached and a day fixed for its sale to satisfy a decree which had been obtained against Mr. Phillippe, by one of the co-sharers, for the rent of an *ijara*. Phillippe having appealed from the order directing the sale of the properties was, on the 11th of January 1873, set aside as illegal, under Act VIII (B.C.) of 1859, section 64. The decree-holder then proceeded against the mortgaged properties of Mr. Phillippe, attached and sold them, but the proceeds were insufficient; he then applied again for the attachment and sale of the lands now sued for, and they were attached on the 12th of January 1875. Previous to this last application, however, Phillippe had sold the lands for Rs. 6,000, on the 10th of January 1873, to the plaintiff, who intervened under section 246, Act VIII of 1859, but his claim was disallowed. He then brought this regular suit and obtained a decree in the High Court. The defendants appealed.

Baboo Srinath Das, Baboo Taruck Nath Dutt and Baboo Kristo Mohun Gangooly, for Appellant.

J. D. Bell, for the Respondent. Baboo Nulit Chunder Das, with him.

1878
 March 25.

The judgment of the High Court (1) is as follows:—

We do not think it necessary to call upon the respondent to prove this case. The facts of the case are fully set out in the decree of the Subordinate Judge, and it is unnecessary to enter into detail. The point for decision in this case is, whether the sale of the properties by the defendant No. 4, Clement John Phillippe, was a valid sale or not. The defendants contend that at the time the sale was made, namely, in January 1873, the properties were conveyed by Phillippe to the plaintiffs were under a decree in execution of a decree for rent against Phillippe, obtained by one Otool Chunder Shaha, in satisfaction of whose claim the defendants purchased the property at an auction sale on the 10th of May 1875. It appears from a proceeding, which is found at page 22 of the printed book, that the Judge of the High Court, on appeal by Clement John Phillippe, found that the decree-holder was a co-sharer of an *ijarah*, and that there-

(1) KEMP and MORRIS, J.J.

ons of section 64, Act VIII (B.C.) of 1869 were applica-
nd that the order of the Moonsiff for the auction sale of
ruse of Mr. Phillippe, the judgment-debtor in the rent suit,
property being immoveable property, was illegal under the
d section 64, inasmuch as the decree-holder must, under
section, first seize and sell the moveable property of the
ent-debtor before he can seize and sell in execution the
eable property of that judgment-debtor. The Subor-

Judge has considered the case to fall within the purview
tion 65 of the Rent Act VIII (B.C.) of 1869, but whether
s within section 64 or section 65, we are clearly of opinion
ader either section the decree-holder is bound to take out
ion in the first instance against the moveable property of
gment-debtor which such judgment-debtor may possess
the jurisdiction of the Court in which the decree for rent
ated, and it is not unless and until all the moveable prop-
of the judgment-debtor has been sold and the sale proceeds
a property are found insufficient to satisfy the decrees of
gment-creditor that he can proceed to seize and sell the
eable property of the judgment-debtor in satisfaction of
ecrees.

it is clear in this case that the moveable property of the
nt-debtor was sold in the month of September 1874, and
was not until the 15th of December 1874, that the decree-
applied under the provisions of section 64 to proceed to
nd sell the immoveable property of the judgment-debtor.
ore that application was made, the properties had passed
the conveyance of the 24th January 1873 to the plaintiffs
uit. We are, therefore, clearly of opinion that the decision
Subordinate Judge in this case is a right decision, and we
the appeal with costs.

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SARODA
PROBOD
GANGGOOLYv.
TABUCK
CHUNDER
BHUTTA-
CHALJE.

Judgment.

[CIVIL APPELLATE JURISDICTION.]

1878
April 5.

RATAN DABEE PLAINTIFF

AND

MODHOOSOODUN MOHAPATOR AND OTHERS DEFENDANTS

Mitakshara Law—Joint Family—Exclusion of Widow—Right of Survivorship.

Under the Mitakshara Law, an unseparated grandfather's grandson's grandson will exclude a widow from inheriting the property of her husband.

Sri Rajah Yemmula Gavuridevamma Garu vs. Sri Rajah Y. Ramandora Guru, 6 Mad., 93; and *Naraguntty Lutchmeo Datta vs. Vangama Naidoo*, 9 Moore's Ind. Ap., 66, cited.

SPECIAL APPEAL from a decision passed by the Judge of the District Court at Cuttack, affirming that of the Moonsiff of Balasore.

In this case plaintiff sued for possession of her husband's property, on the ground that he had separated from the defendants, his relatives, and was living separate at the time of his death. The defendants denied that any separation had taken place, and alleged that plaintiff's husband had lived as a member of the joint family, and denied the plaintiff's right to separate possession of any property belonging to the husband. The parties are subject to the Mitakshara law.

The suit was dismissed in both the lower Courts, and plaintiff appealed specially on two grounds: (1) that an unseparated grandfather's great-grandson's grandson cannot exclude a widow from inheriting the estate of her husband; and (2) that under the Mitakshara law a widow loses her right of inheritance in cases where there are joint members, with whom separation could take place after separation.

Mr. R. E. Twidale and Baboo Bhowany Churn Datta, Appellants.

Baboo Obhoy Churn Bose, and Baboo Aubinash Chandra Banerjee, for Respondents.

The judgment of the High Court was delivered by

JACKSON, J. JACKSON, J. :—

This case, and the others depending upon it, rest upon

sition advanced by the special appellant's pleader, that in use of persons governed by the Mitakshara law, a widow is not to succeed to the property of her deceased husband, though not separate, unless there are sapindas claiming to succeed between whom and the deceased person there can be relationship after separation, and that class, it is suggested, is limited to the case of brothers, father, and paternal uncle. We asked the pleader to show us on what authority he based this contention, and, admitting that there is no authority, he contends that it is supported by the 39th verse of section 1, chapter II of the Mitakshara. That verse is far from making out the precise proposition which is here contended for, and it is certainly within my own experience that many other sapindas and notably brothers and sons in the case of a joint family, do exclude the widows under the Mitakshara law. So far from there being any authority for the decided cases in favour of the appellant, there is one case cited, 98—*Sri Rajah Yemmula Gavuridevamma Garu vs. Sri Yemmula Ramandora Garu*, decided by Chief Justice Scott and Mr. Justice INNES, in which the rule is thus broadly laid down:—"We are of opinion, therefore, that the sound rule to apply with respect to undivided or impartible ancestral property, that all the members of the family, who, in the way we have pointed out, are entitled to unity of possession and community of interest according to the law of partition, are co-heirs, not only in respect of their degrees of agnate relationship to each other, but also in respect of their degrees of consanguinity to the common ancestor." It may be mentioned that the Court on that occasion referred to a case in 9 Moore's Ind. App., 66—*Naragunty Lutchmee Mah vs. Vangama Naidoo*, in which a claim of heirship to property by a collateral relation in the fourth degree of descent from the common ancestor, the deceased owner being a descendant in the fifth degree, was upheld against the widow. It seems to me that in the absence of direct authority for the proposition now advanced, we should run the risk of very seriously disturbing the recognized rules of inheritance under the Mitakshara if we affirmed that proposition to be true. The appeal is dismissed with costs.

1878

RATAN DABEE
v.
MODHOOSOO-
DUN MOHA-
PATOR.

Judgment.

JACKSON, J.

[ORIGINAL CIVIL JURISDICTION.]

1878
July 1.

HAJEE MAHOMED BADSHA SAHEB . . PLAINT

AND

NICOL, FLEMING & CO. DEFEND

*Joinder of parties—"Question in the suit"—Action for damages—A
1877, section 32—Judicature Acts, Order 16, Rules 13, 18.*

A sold a cargo of wheat to B, who afterwards sold it to C. The sales were substantially upon the same samples. Subsequently B brought an action for damages against B, on the ground that the bulk of the wheat did not correspond with the samples; and he asked for an order that A be joined as a party defendant to the action. *Held*, that section 32 of the Code of Civil Procedure did not warrant such an order, as A was not a necessary party for the purpose of "effectually disposing of all the questions in the suit between C and B."

Judicature Acts, Order 16, Rules 13, 18, discussed

ON the 10th of July 1877, Nicol, Fleming & Co., of Calcutta, entered into a contract with Pestonjee Eduljee Gussanwala for the purchase by the former of a cargo of wheat to be shipped on board the ship "Caroline" at Chaudballi, which was to sail for Madras some time in the month of July. The purchase was made by sample.

On the 16th day of July 1877, the defendant Nicol, Fleming & Co., by telegram, offered the above cargo for sale to the plaintiffs, who telegraphed their acceptance on the same day. On the 18th of July 1877, Nicol, Fleming & Co. sent the plaintiffs a sample of the rice, upon which the sale by them had been made. The plaintiffs at Madras. When the "Caroline" arrived at Calcutta the plaintiffs complained that the bulk was not equal to the sample, and subsequently instituted the present suit for damages on account of the alleged inferior quality of the rice.

Nicol, Fleming & Co., while denying that they had broken their contract with the plaintiff, or that he was entitled to recover damages, alleged that the question between the plaintiff and themselves was precisely the same as that between the

Eduljee and themselves ; and on this ground they obtained a rule, calling on the plaintiffs and Pestonjee Eduljee to show cause why the latter should not be added and joined as a defendant in the suit.

J. D. Bell, and *Stokoe*, for Pestonjee Eduljee, showed cause.—Pestonjee Eduljee cannot be made a party to this suit under section 32, as all the questions in the suit can be settled without it. Further, the present case is not within the class of cases in which parties are added under the Judicature Acts, which are cases of principal and surety—*Turner vs. The Hednesford Gas Co.*, 3 Ex. D., 145 ; 47 L. J. Ex., 296 ; and of principal and agent—*Ex parte Smith* ; in *re Collie*, 2 Ch. D., 51 ; and see Form B, No. 1, Appendix to Judicature Acts. In *Swansea Shipping Co. vs. Duncan*, 1 Q. B. D., 644, the custom of the port would have made the person added liable to the plaintiff. In *Harry vs. Davey*, 2 Ch. D., 721, the Court refused to add parties in a case similar to the present. The question to be tried here is not the same between the sets of parties as it was in *Benecke vs. Frost*, 1 Q. B. D.,

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Argument.

Hill, (for *Branson*), for the plaintiffs.—In all the English cases where a party has been added in cases similar to the present (*Swansea Shipping Co. vs. Duncan*, 1 Q. B. D., 644 ; *Bower vs. City*, 1 Q. B. D., 652) the order was made under order 16, rule 12. Such an order could not be made under order 16, rule 13, and under this rule which has been re-enacted in the Code of Civil Procedure. Again, we should not have been called upon to do so in this case ; there is no provision warranting such a course in the Code of Civil Procedure, nor is there, even under the English law, the only reason for giving notice under the Judicature Acts to enable the third parties to come in if they wish.

Hillips, for the defendants, Nicol, Fleming & Co.—The issue between the plaintiff and the defendants is the same as that between the defendants and Pestonjee Eduljee. That being so, this is within the principle of the English cases. It has been established that there must be a direct liability of the outsider to the plaintiff on the same claim as the defendant is liable upon, and that is contradicted by *Benecke vs. Frost*, 1 Q. B. D., 419, and *Swansea Shipping Co. vs. Duncan*, 1 Q. B. D., 644. The

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object is to prevent the same question from being litigated twice or differently decided by different juries. The *Swansea Shipping Co. vs. Duncan* shows that the parties must appear and take part in the trial, if a material question in the action is also a question between the defendant and the third person, and that is the case here.

Judgment. PONTIFEX, J. :—

PONTIFEX, J. In this case Nicol, Fleming & Co., merchants, of Calcutta, purchased from one Pestonjee Eduljee, a cargo of rice, Chandballi, of three different qualities, according to sample. A few days afterwards Nicol, Fleming & Co. telegraphed Hajee Mahomed Badsha Saheb at Madras an offer to sell to him a cargo of rice then at Chandballi, by description, and that offer was accepted by telegram. Two days after receiving the telegram, Nicol, Fleming & Co. sent down to Madras three different samples of the cargo. These samples were received by the plaintiff as not differing from the previous description and no objection was made to them. Subsequently to the arrival of the cargo at Madras, plaintiff complained that the bulk of the cargo did not correspond with the samples; a survey was held at which the bulk was compared with the samples, and the whole dispute between the plaintiff and the defendant seems to me to depend on the question whether the bulk did or did not correspond with the samples sent down to Madras by Nicol, Fleming & Co. two days after receiving the telegram. If that be so, and if Nicol, Fleming & Co. sent proper samples of the rice which they bought of Pestonjee Eduljee, then Nicol, Fleming & Co. would have the same complaint against Pestonjee Eduljee, as the plaintiff Hajee Mahomed has against them, namely, that the bulk of the cargo shipped did not correspond with the sample.

In this state of circumstances Hajee Mahomed Badsha Saheb has filed a suit for damages against Nicol, Fleming & Co. because the bulk of the rice shipped to Madras was not equal to the samples, and in that suit Nicol, Fleming & Co. have asked for an order that Pestonjee Eduljee may be added as a party, so that the question which is common to Pestonjee Eduljee and Nicol, Fleming & Co. may be tried in the former's presence.

support of this application Nicol, Fleming & Co. rely on section 32 of the new Civil Procedure Code. By that section it is enacted that "the Court may at any time," either upon or without the application of either party, "and upon such terms as the Court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who *ought* to have been joined, whether as plaintiff or defendant or whose presence before the Court may be *necessary* in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added." According to the strict interpretation of that section, I cannot say that, the suit which he has preferred against Nicol, Fleming & Co., a plaintiff *ought* to have made Pestonjee Eduljee a party; nor do I think that Pestonjee Eduljee is *necessary* as a party, "in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit." Those questions can be settled effectually without him. No doubt it would save expense and further litigation if he could be added, but I do not think it is necessary that he should be.

On referring to section 32, I find it is taken *verbatim* from order 16, rule 13, of the Judicature Act of 1875. Now, under rule 13 of the same order Nicol, Fleming & Co. would be entitled to have Pestonjee Eduljee added as a party; for though in the forms given in the appendix to the Act—Appendix B., form 1—the illustrations put are confined to cases of principal and agent or principal and co-defendant, and though most of the cases which have been cited from the Law Reports are also of that nature, yet there is one case, that of *the Swansea Shipping Co. vs. Duncan*, I. Q. B. D., 644, which mainly goes far enough to show that if order 16, rule 13 were a part of the Civil Procedure Code, Pestonjee Eduljee could be added as a party.

But I am of opinion I have not the power to add Pestonjee Eduljee as a party. The words of the section do not enable me to do so; and the fact that section 32 is taken from order 16, rule 13, shows that order 16 rule 13, was not intended by the framers of this Code to apply to the procedure in India. The application will be dismissed with costs.

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AND CO.
Judgment.
PONTIFEX, J.

[CIVIL APPELLATE JURISDICTION.]

1877
August 27.

UNNOCOOL CHUNDER CHOWDHRY }

AND OTHERS }

DEPENDANTS;

AND

1878
March 28.

HURRY NATH KOONDOO PLAINTIFF.

Attachment and sale—Property beyond jurisdiction—Order made at jurisdiction—Erroneous order—Failure to object to a void sale—Confirmation—Act VIII of 1859, sec. 257.

Where a Moonsiff orders the attachment and sale of a talook, which lies outside the jurisdiction of his Court, the order is, as to this latter portion, a nullity, and an attachment and a sale pursuant to the order are void.

The order of a Court which is not empowered to make any order at all, does not stand on the same footing as an erroneous order by a Court empowered to deal with the subject-matter of that order.

The failure to object to a sale, if the Court had no power to confirm it, does not make the confirmation thereof conclusive.

The limitation of the remedy by separate suit contained in Act VIII of 1859, section 257, applies to cases where a Court acts within its jurisdiction, and not to cases where a Court has gone out of its jurisdiction.

Kalee Prasunno Bose vs. Denonath Bose Mullick, 19 W. R. 11 B. L. R., 56; and *Syed Nawab Ali vs. Shaikh Wayid Mahomed*, 11 W. R., 233, considered.

SPECIAL APPEAL from a decree passed by the Judge of the Furreedpore, modifying that of the Moonsiff of that station.

The learned Judge states the case as follows :—"This is an appeal from the decision of the Moonsiff of Furreedpore, dated the 1st of June 1875. The question is this: It is admitted that a talook numbered 311, belonging to one Altab Ali, was brought to sale in execution by the Moonsiff of Bhanga, but it is said that certain Kismut, named Hashara, within this talook, and which the defendant holds in patni, is not in Bhanga, but in the Furreedpore Sudder Moonsiffi. It is therefore argued that Hashara should not pass under the sale, as the Moonsiff of Bhanga had no power to sell property out of his own jurisdiction. The appellant

precedent which certainly bears him out in his contention, being absolutely on all fours with the present case. It is a decision of **BIRCH, J.**, in *Syed Nawab Ali vs. Shaikh Wajid Mahomed*, 23 W. R., 233. If this stood alone I should be constrained to decide the appeal in his favour. But the respondent refers to a decision by the Chief Justice, and **JACKSON and DWARKANATH MITTER, J.J.**, in the case of *Kali Prossunno Bose vs. Denonath Bose Mallick*, 19 W. R., 434. There it is laid down broadly that where an estate is entered in the *towji* of a Collectorate and consists of villages of which the greater part are in that Collectorate, it may be considered for purposes of execution as wholly within that district. This is wider than is necessary for the present case. In the present case no objection was taken by the judgment-debtor, either at the time of the attachment, or at the time of the sale." The Judge affirmed the Moonsiff's judgment, and then the defendant brought this special appeal.

Baboo Taring Kant Bhattacharje, for Appellants.

Braunfeld, for Respondent. *Baboo Bungshee Dhur Sen* with

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KOONDOO.
Statement.

The judgment of the High Court (1) is as follows:—

The Moonsiff of Bhanga sold a certain talook in execution of a decree, a portion whereof was outside the limits of the local jurisdiction of the Moonsiff; that portion is held in putnee by defendant. The plaintiff, as auction-purchaser, sues for the rent of the putnee falling due since the date of his purchase, and is defended by the plea that the sale by the Moonsiff of Bhanga of a portion of the estate which is beyond the local limits of his jurisdiction is of no legal effect.

1877
August 27.
Judgment.

Both the Courts below have held that the Moonsiff had authority to sell the talook in its entirety, and that the sale holds good for the whole. The Judge refers to the case of *Kali Prossunno Bose*, 19 W. R., 434; 11 B. L. R., 56, in which it was held that the sale of an estate in the Civil Court of Nuddea was a good sale of the whole estate, although 18 out of the 60 villages comprised in it lay outside the local jurisdiction of the Civil Court of the 24-Pergun-

(1) *AINSLIE and McDONNELL, J.J.*

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KOONDOO.
—
Judgment.

nahs, the estate being registered as a single property in the
of the Collector of Nuddea. That case has been held by
Judge below to be a sufficient authority for passing by
decision of Mr. Justice BIRCH, in a case precisely similar to
present, reported in 23 W. R., 233—*Syed Nawab Ali
Shaikh Wajid Mahomed*.

The cases are, however, clearly distinguishable. An estate
taken as a single property may well be said to lie in that district
in which it is registered on the towzi of the Collector, and in
which its revenue is paid; but this test is inapplicable in the
case of an estate parts of which are situated in two or three
Moonsiffias or sub-divisions of one district. That the rule
Mr. Justice BIRCH makes it ordinarily impossible for a Mortgagee
to sell an entire estate when the whole of it is not contained
within the boundaries of his local jurisdiction is not material.
If he cannot sell himself, he can transfer the decree for execution
to a Court in the district which has jurisdiction to deal with the
whole property or, at the request of the judgment-creditor, the Court
may sell the debtor's interests in such portions of the estate
as lie within his jurisdiction. A talook is not impartible, and must,
of necessity, be attached and sold in one lot. A Mortgagee may,
if so minded, attach and sell single villages. It would be a
serious hardship to debtors to hold that a man's estate comprising
several villages must necessarily be sold in execution of a decree
in one lot, although by selling a single village the whole debt
under the decree might be satisfied, and although the debtor
might be content to sell such limited interest.

There being nothing to prevent a judgment-creditor selling
his debtor's estate, he cannot, by electing to sell a single
property, give jurisdiction, as of course, to a Court in the district
of portions lying beyond the bounds of its ordinary jurisdiction.
In certain cases, it appears from the decision in 19 W. R., 56,
B. L. R., 56, he can do so, but this arises from the fact that
no single Court in existence which has local jurisdiction over the
property taken as a single entire estate. The creditor is not to
treat as made up of different properties that estate which the
debtor treats as a single property and engages for as a mortgage
to the Government, and which is publicly recorded and liable

a single estate; and it thus happens that, when there is no single Court having jurisdiction over every part of the estate, the creditor can proceed against the whole in that Court which has local jurisdiction where the estate is registered. Where there is a Court vested with local jurisdiction over the whole property, the creditor must resort to that Court if he means to deal with the whole of a single property to be sold in one lot. The authority of the case 19 W. R. 434, 11 B. L. R., 56, does not warrant us in holding that a creditor may ignore the Court which has jurisdiction and lawfully sell in a Court which ordinarily has not jurisdiction.

Cases may perhaps arise in which the rule laid down by Justice BIRCH would not apply, but there is nothing in the facts of the case before us, so far as we know, to enable us to distinguish it. The appeal must be allowed, and the suit dismissed with costs in all Courts.

The respondent applied for a review of judgment. A rule was granted, on the argument of which their Lordships delivered the following judgment] :—

This application must be rejected. It is contended that the respondent was not in a position to question the title of the auctioneer-purchaser while the judgment-debtor remained silent and acquiescent in the sale. That there was such acquiescence we cannot say. The complaint shows that from the day of his purchase the auctioneer-purchaser never received any rents of the patni. The tenant was certainly entitled to defend himself against the possibility of being called upon to pay his rent twice over, and although we should probably have held that he was bound to recognize the proceedings of a Court of Justice having jurisdiction over the land, and that the order of such Court might be sufficient warrant for his payment of rents to another than his original lessor, the order is otherwise when the proceedings on which plaintiff relies are those of a Court which has no jurisdiction over the land. The order of a Court which is not empowered to make any order at all does not stand on the same footing as an erroneous order by a Court empowered to deal with the subject-matter of that order. An auctioneer-purchaser at a sale held *ultra vires* could not give a valid receipt for the rent due at the time this suit was brought, unless he could show that the sale had somehow become conclusive as

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Judgment.

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March 23.

Judgment.

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KOONDOD.

Judgment.

against the former owner. We need not consider how the matter stands now, if, as alleged, there has been registration under VII (B. C.) of 1876, as this suit was instituted in 1875. It is said that the judgment-debtor could not reopen the question of validity of the sale by a separate suit, that he was bound to apply for amendment of the proceedings by petition, and if necessary by appeal, and that consequently his tenant could not have a more extended right. This objection, however, appears to have no force. It gives the go-by to the question of jurisdiction. If a Court, holding a sale in execution of a decree, acts wrongly within its jurisdiction, the remedy by separate suit is barred. The limitation of the remedy by section 257, Act VIII of 1859 applies to such cases, and not to the case where a Court has acted wholly out of its jurisdiction. The failure to object to the sale if the Court had no power at all to hold it, does not make the confirmation thereof conclusive. The Legislature was not intending for cases in which a Court assumed an authority not vested in it by any law, but for correction of its errors in the exercise of its legal powers.

Inasmuch as a decree for the rent made in the absence of the former owner would not have prevented his suing for recovery of his rent on showing that the title to it had not passed to him (leaving out of consideration the Bengal Registration Act, which was not passed when this suit was brought), there is nothing to prevent the tenant raising the plea of want of title. Rule discharged with costs.

[PRIVY COUNCIL.]

HOOBUN MOHINI DEBIA AND ANOTHER PLAINTIFFS;

AND

BARRISH CHUNDER CHOWDHRY . . . DEFENDANT;

1878
April 13.

Gift of Gift—Void restrictions—Life Interest—Estate Tail—Executory Devise—Conditional Limitation—Defeasance—Failure of Issue—Construction—Sunnud—Ut res magis valeat quam pereat.

The gift of an estate to a man *simpliciter* carries an estate of inheritance in Hindoo law, and if to such a gift there be added an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected.

Tagore case, 4 B. L. R., 182; 9 B. L. R., 337; cited.

The grant of a talook to A *simpliciter*, for her support, followed by a clause which declares that the generations born of her womb, but no other heir of hers, should enjoy the property, will be construed to give A an absolute estate of inheritance, defeasable in the event of A dying without issue living at her death, in which case the estate would revert to the donor and his heirs.

Sootjemong Dossee vs. Denobundoo Mullick, 9 Moore's Ind. App., 134, cited and followed.

A grantor will not be considered as intending to convey an estate which the law prohibits, unless the grant does not fairly admit of being construed in a sense to which the law will give effect.

APPEAL from a decree passed by the High Court of Judicature Calcutta (BIRCH and MITTER, J.J.), reversing that of the subordinate Judge of Mymensingh. The judgment of the High Court will be found reported in 24 W. R., 268.

With, Q. C., and *Doyle*, for Appellants.

John Williams, Q. C., *Mayne*, and *Woodroffe*, for Respondents.

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DEBIA

v.
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CHOWDERY.

Judgment.

The facts of the case are sufficiently set forth in the judgment of their Lordships of the Privy Council (1), which is as follows:—

The facts which give rise to the questions of law into which this case resolves itself are as follows:—Shumbhu Chunder Surmana, in 1819, granted a talook to his sister, Kasiswari, by a sunnud in the following words:—

“Shumbhu Chunder Surmana.

“Sunnud executed to the worthy to be remembered Kasiswari for good conduct; in the year 1226 B. S.:—

“You are my sister: I accordingly grant you as a talook for yourself for three dehas (villages), Hurripur, Futehpur, and Kudumtoli, in Jonardunpore in my zemindari, pergunnah Mymensingh, at a tahut of Rs. 361, three hundred and sixty-one rupees, with the land and trees, &c., comprised within the four boundaries, [and] all [rights] appertaining to the said mouzahs. Being in possession of the lands and according to the tahut jumma, do you and the generations (*santan*) of your womb successively (*kram*) enjoy the same. No other heirs shall have right or interest. To this effect I have written this sunnud.

“The 8th Byasack, 1266.”

Another translation of the document is given by the Court substantially to the same effect.

At the date of the sunnud Kasiswari had one child, a daughter, Chundermoni, one of the original plaintiffs in the case. Kasiswari afterwards had a son who died in her lifetime, leaving a widow, who was a co-plaintiff, suing as guardian of the person of whom he had adopted. Kasiswari held undisputed possession of the talook until her death in 1871, and by her will (together with other property) to the two plaintiffs in equal moieties. On the death of Kasiswari, the defendant, her son, his father Shumbhu Chunder Surmana, took possession of the talook, whereupon the plaintiffs instituted the present suit to obtain possession of it, together with mesne profits from the date of their dispossession on the death of Kasiswari. Part

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MORRIS SMITH, and Sir ROBERT P. COLLIER.

it, the daughters of Chundermoni have been substituted for her as plaintiffs.

The plaintiffs claimed under the will of Kasiswari. A question, indeed, arose whether their plaint could be construed as containing an alternative claim on behalf of Chundermoni under a sunnud independently of the will, but in the view which their Lordships take of the case, this question becomes immaterial.

The defendant denied the right of Kasiswari to dispose of the talook by will, contending that she took only a life estate under a sunnud. The principal ground on which he based this contention in the Court below was that the terms *santan sreni krame* imported only sons of Kasiswari living at the time of her death, and that these could only take, if at all, as donees under the sunnud.

No dispute was raised as to the genuineness of the will of Kasiswari, or its validity to pass whatever interest she was capable of devising. The Subordinate Judge gave judgment in favour of the plaintiffs. The grounds of his judgment, which were not very clearly stated, would appear to be that, in his opinion, Chundermoni took an absolute estate under the sunnud on the death of her mother, but that having elected to take under her mother's will, and to admit the co-plaintiff to a half share of the talook, both the plaintiffs were entitled to maintain the action against the defendant. He gave the plaintiffs a decree for possession together with *wasilat*, the amount of which is not stated.

On appeal to the High Court, in addition to the contention that *santan* signified sons only, it was urged that the sunnud was an attempt to create an estate tail in contravention of Hindu law and was, therefore, void, except in as far as it gave a life interest to Kasiswari. The High Court do not adopt this view. So they agree with the appellant that the Hindu words which have been quoted import issue male only, but they regard them as bearing "the wider and more general meaning of issue." They hold that Chundermoni having been born before the date of the sunnud took under it a life interest in the talook, in succession to the life interest of her mother. But that the plaintiffs, having sued in respect of the life interest, but having claimed

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Judgment.

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 v.
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 CHUNDER
 CHOWDREY.
 Judgment.

under the will of Kasiswari, which she was incompetent to make, their suit must be dismissed. From this judgment the present appeal is preferred.

At their Lordships' bar the main grounds on which the judgment of the High Court has been supported are—(1). That a sunnud is an attempt to create such an estate as is known in England by the name of an "estate tail," in contravention of Hindu law, which does not recognize such an estate. (2) Even if this be not so, the gift to the children of Kasiswari born after its date, as well as to those then born, is in contravention of the rule of Hindu law that no gift can be made to a person who is not "a sentient being" at the time of gift. In support of these propositions, the case, commonly called the *Tagore case*, reported in the 9th Vol. of the Bengal Law Reports, p. 337, was quoted. It was further argued that, if the gift is void because made in favour of a class who could not legally take—that is to say unborn children—it could not be validated by the birth of Chundermoni (who happened to be born at the time), by changing it from a gift to a class into gift to a designated individual. And in support of this proposition the cases of *Gee vs. Rodney* (1 Cox, p. 324), and *Leake vs. Robinson*, (2 Merivale, p. 100) were cited.

It appears from the sunnud that the donor intended to create more than a life estate. If the estate which he intended to convey was one which the law prohibits, effect cannot be given to his intention; but before coming to this conclusion the Lordships must be satisfied that the instrument does not admit of being construed in a sense to which the law will give effect.

In the judgment of the *Tagore case* the following passage is to be found:—

"If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, pass under Hindu law (as under the present state of law it does by will in England) as an estate of inheritance. If there were added to such a gift an intendment or description of it as a gift of inheritance, not excluding the intendment imposed by law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with supplementary words restricting the power of transfer which the law annexes to such an estate, it would also pass as an estate of inheritance."

estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, although he adds a qualification which the law does not recognize."

The doctrine herein expressed had been frequently acted upon by the Courts in India, who have decided that words giving lands to the donee, "his children and grandchildren," conferred upon him an absolute estate. (See judgment of Sir BARNES PEACOCK in the *Tagore case*, 4 Bengal Law Reports, p. 182.)

If the words of the sunnud, "You are my sister; I accordingly grant to you a talook for your support" had stood alone, it might have been open to question whether an absolute grant, or a grant for life only, was intended. Coupled with the words that follow, "Being in possession of the lands and paying rent according to the tahut jumma, do you and the generations born of your womb successively enjoy the same," they appear to import an absolute estate such as would have been given had the words been "your children and grandchildren . . ." And no inference can be drawn far arises that the donor had an English estate tail in his contemplation, as the testator in the *Tagore case* undoubtedly had. The only difficulty is caused by the words which follow, "no other heir of yours shall have right or interest." Upon the most careful consideration which their Lordships have been able to give to the meaning of these negative words, it appears to them that they may be read as referring to the time of the death of Kasiawari, that their effect is to make the absolute estate before granted defeasible in the event of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs. That there is nothing in such a condition repugnant to Hindu law appears from the decision of this tribunal as to an executory devise in the case of *Soorjeemoney v. Denobundo Mullick* (9 Moore's I. A., p. 184), as explained in the *Tagore case*.

Their Lordships are, therefore, of opinion that Kasiawari took the whole estate defeasible on the happening of an event which might not occur, and that she had, therefore, an estate which she could dispose of by will. It follows that the plaintiffs are entitled to succeed in this suit. It is unnecessary to decide what their

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rights may be *inter se*. Their Lordships will, therefore, hu advise Her Majesty that the decree of the High Court be rev and that the decree of the Subordinate Court be affirmed. appellants will have their costs in the Courts of India, a this appeal.

[CIVIL REFERENCE.]

April 17. ASLEM PLAINTIFF

AND

KALLA DURZI AND ANOTHER DEFENDANT

*Seizure of Cattle—Illegal Impounding—Special Procedure—Civil
Suit—Act I of 1871*

A suit for compensation for expenses incurred in releasing which were wrongfully impounded by the defendant will not lie in Court.

The Legislature, when establishing pounds by Act I of 1871, special remedy in cases of illegal seizure, and that is the only available.

REFERENCE under section 617 of the new Code of Procedure, Act X of 1877, from the Moonsiff of Nool. The terms of the reference are as follows:—

“The plaintiff sued to recover Rs. 13-12, being the amount of fines paid and expenses incurred by him in procuring the release of the cattle consisting of 21 buffaloes which were illegally seized and wrongfully detained in a pound where the defendants conveyed them. It is established by the evidence that the seizure and detention of the plaintiff's cattle were illegal and not justifiable under the law.

“Now the question raised is whether the provisions of Chapter V, of Act I of 1871 operate as a bar to the maintenance of a suit in a Civil Court. The opinion of the High Court, on this point is solicited. I am of opinion that the provisions of Chapter V, taken together with those of Chapter VII, preclude the maintenance of a suit of this nature in a Civil Court, notwithstanding that there is no express provision to that effect. The Act (Act III of 1857) provided an additional clause regarding

its of illegal seizures, and laid down that "Moonsiffs and other judicial officers having original jurisdiction, and not invested with criminal powers, may be specially invested by the local government with the power of receiving and trying complaints under this (15th) section, and in the exercise of such powers shall be subject to the same rules as assistants and other officers subordinate to the Magistrate." In case a civil suit lies, there does not seem to have been no need of the above provision. But the exclusion of it from the recent law does not, I think, vest in the court a power which it otherwise would apparently not have."

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 ASLAM
 v.
 KALLA
 DURZI.
 Judgment.

The judgment of the High Court (1) is as follows :—

We think that the Moonsiff is right in holding that the defence of this suit is barred by the provisions of Act I of 1871. Chapter V of that Act prescribes a special procedure for obtaining redress in the case of illegal seizure of cattle, and Chapter VII of that Act reserves the right of a civil suit only in the case specified in section 29 of the Act. It is clear, therefore, that parties by illegal seizure of cattle having a special remedy under the Act are not entitled to maintain a civil suit for the same cause. The Moonsiff's order is therefore correct.

We think it right to observe that the provisions of Act III of 1877, to which the Moonsiff refers, have nothing to do with the question for decision in this case.

(1) MITTER and MACLEAN, J.J.

[CIVIL REFERENCE.]

1879
April 17.

TARINEY CHURN NUNDY PLAINTIFF
AND
SHAIKH ABDUR ROHOMAN AND ANOTHER DEFENDANT

Limitation—Account stated—Act IX. of 1871, sec. 21, and Sch. II., and Stamp Act XVIII. of 1869, Sch. II. cl. 5.

Section 21 of Act IX. of 1871 has no application where the payments of interest admitted were made after the expiration of the period prescribed for the re-payment of the loan.

An account stated, within the meaning of Art. 62, Sch. II., of 1871, need not be signed by the debtor.

An adjustment of account is not admissible in evidence unless it bears with a one anna stamp.

THIS was a reference under section 617 of the Code of Procedure, of 1877 from the Sudder Moonsiff of Rungpore, the terms of which are as follows :—

Plaintiff brought this suit to recover principal and interest on a simple bond for Rs. 25, dated the 1st Asarh 1280 B.S. The bond recites that principal and interest should be paid in 1280 B.S. The plaint was filed on the 21st August 1877, corresponding with the 6th of Bhadro 1284, that is more than 4 years after the time of the accrual of the cause of action. Plaintiff dates his cause of action from the 14th Cheyt 1282, the day on which he alleges that the defendant having made payment on account in 1282, balanced the account on the face of the bond and acknowledged the balance Rs. 33-12-6 to be due from him. The balancing of the account is not signed, and it bears no stamp. Besides other objections on the merits of the case, the defendant has pleaded that the balancing of the account cannot be admitted as evidence, inasmuch as it is not stamped and signed by him, and that therefore the plaintiff's claim is barred by limitation. To me the objection seems to be a valid one. According to the plaintiff's own allegation, his cause of action had been given birth to by the defendant on the 14th Cheyt 1282, by balancing the account, and thereby acknowledging the debt. By section 20 of Act IX. of 1871, an acknowledgment or promise must bear the signature of the person making it.

promisor or person acknowledging. The signature is indispensable, though it matters not whether it be made by the promisor himself or by his recognized agent. I hold that the defendant's signature would not have been required had there not been a balancing of account. According to section 21 of the said Act, simple part-payment of interest does not require the signature of the debtor. In the present case there is not only part-payment of interest, but balancing of account.

With regard to the other part, viz., the question of stamp, I hold that under the provision of clause 5, schedule II. of the general Stamp Act, a one anna stamp is necessary to make the balancing of account admissible in evidence. The plaintiff's pleader has urged that clause 3 of section 15 of the general Stamp Act applies to this case. In this contention I do not agree with the plaintiff's pleader. As the plaintiff has applied for a reference on the above two points for the opinion of the Honorable High Court, I thought it proper, for the satisfaction of the parties concerned, to submit the case for the opinion of the Honorable High Court on the following points:—

1. Is the signature of the defendant necessary on the balancing of account?
2. Is stamp necessary to make the balancing of account admissible in evidence?

The judgment of the High Court (1) on the reference submitted is as follows:—

In this case section 21 of Act IX of 1871 has no application, inasmuch as the payments admitted were made after the expiration of the prescribed period for re-payment of the loan. With reference to the first question submitted by the Moonsiff, we think that if the plaintiff should succeed in proving that within the meaning of article 62 of the Limitation Act of 1871, the money claimed in this suit was found to be due from the defendant to the plaintiff on accounts stated between them, he would be entitled to a decree, although the balancing of the account has not been signed by the defendant. As regards the second question, we think that the Moonsiff's view of the law is correct.

(1) MITTER and MACLEAN, J.J.

1878

TARINAY
CHURN
NUNDY
D.
SHAIKH
ABDUL
ROHOMAN.

Statement.

Judgment.

[CRIMINAL REVISIONAL JURISDICTION.]

1878
May 6.

IN THE MATTER OF BARODA PROSUNNO CHUCKERBUT
AND OTHERS.

Trial by Bench of Magistrates—Powers of Bench—Absence of members at adjourned trial.

A case triable only by a Magistrate exercising powers of the 1st class came before a Bench of Magistrates, neither of whom individually exercised those powers, but sitting together the Bench was so invested. At the adjourned trial only one of these Magistrates was present. *Held*, that he was not competent to try the case alone, and the proceedings passed by him were set aside as illegal.

THIS was a case referred to the High Court as a Criminal Revision to set aside an illegal order passed by a Bench of Magistrates.

The facts sufficiently appear from the judgment of the High Court, which is as follows (1) :—

The only question for our consideration is, whether, when the Bench of Magistrates who heard the evidence on the first day on which the case was taken up, did not sit on a subsequent day when further evidence was taken, this fact vitiated the decision of the Bench in which he took part.

We have to remark that the case was one of an impending disturbance of peace, and from the record we find that the District Magistrate on the 5th of December 1877, referred the Police report to the Deputy Magistrate, Babu Trailakya Nath Sen, that enquiry should be made with the view of taking recognizance from certain persons. The Judge states in his letter of reference that the case was referred to a Bench of Magistrates consisting of the Deputy Magistrate referred to, stated to be vested with 2nd class powers, and an Honorary Magistrate, but we find no order in the record by the District Magistrate referred the case to any Bench.

(1) MITTAL and MACLEAN, J.J.

The Judge, however, does not impugn the competence of the Bench to deal with the case. We will, therefore, assume that the Bench exercised 1st class powers; for in no other case was it competent to deal with matters to which section 491, Criminal Procedure Code, applies.

The proceedings commenced before Babu Trailakya Nath Sen, and Babu Chandra Nath Sen should have been continued and finished before these gentlemen, and as this was not done, we consider that the proceedings were illegal. Had Babu Trailakya Nath been a Magistrate vested with the necessary (1st class) powers of dealing with the case, it might be that the proceedings would not have been open to question; but he is only invested with 1st class powers, and therefore the illegality of the proceedings runs to us beyond a doubt. The order of the Bench must, therefore, be quashed.

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BARODA
PROSUNNO
CHUCKER-
BUTTY.
Judgment.

[CIVIL REFERENCE.]

UPPERAH LOAN OFFICE (LIMITED) . . . PLAINTIFF;

AND

OUR CHANDRA BARMAN AND ANOTHER . DEFENDANTS.

April 26.

Interest—Discount—Bills of Exchange—Public Company—Registration and publication of rules—Act X of 1866.

It is not illegal to deduct interest in the shape of discount from the amount advanced on a bill of exchange, if such deduction be made with the full knowledge and consent of the borrower, and under such circumstances as would not lead to the inference that unfair advantage was taken of the position of the borrower.

The fact that a Loan Company, registered under the provisions of Act X of 1866, has published and caused to be registered rules regarding the payment of interest on loans, does not bind a borrower to pay the interest as required by those rules, unless he has contracted to do so.

THIS was a reference under section 617 of the Code of Civil Procedure, of 1877 from the Judge of the Small Cause Court at Ammullah, the terms of which are as follows:—

This is an action for the recovery of Rs. 10 as principal Rs. 10-8-3 as interest said to be due on a bill of

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TIPPERAH
LOAN OFFICE
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G.
GOUD
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Statement.

exchange drawn by defendant No. 1, and accepted by ant No. 2. Defendant No. 1 objects: first, that there contract, either verbal or written, entered into by him for t ment of interest; and, secondly, that the amount of claimed after the due date of payment being in the nat penalty is not recoverable.

"The plaintiff Company is a banking firm registered ut provisions of Act X of 1866. This Company was est in the year 1278 B. S., and the Articles of Association th primarily drawn out were sanctioned on the 25th Mare By Article 38, it was provided that interest should be cha 2 per cent. on loans of money by promissory notes for a of one month, and at $1\frac{1}{2}$ per cent. for three months. By 41 it was further provided that on default of payn interest or principal, interest should be charged after th of three months at three per cent. Under the powers of by section 50 of Act X of 1866, the Company framed a of rules on 8th Pous 1280 B. S., which were sanctioned January 1873 by the Registrar. By Rule 1, the rules of March 1871 were made applicable to bills of excha articles 36 and 41 of the same date were re-placed by produced in rules 3 and 6 respectively. On the 7th A fresh alterations were made, and received the assen General Registrar on the 8th June 1875, which I need refer to in detail.

"Such being the facts of the case, the pleader who a behalf of the plaintiff Company argues: first, that th of the Company were legalised by the fact of registra the modification of them having received the sanct Registrar (as above pointed out) are valid to all intents poses, and the Court is bound under section 65 of 1866 to receive them in evidence as well as to give them; secondly, that the rules aforesaid having been and recorded in the books of the Company, it is to h as a matter of law that the borrowers did with full of them take loans, and should therefore be held liab interest according to the said rules. It is also sug matter of fact that the defendants in the present

ed of these rules. I have already alluded to the contention defendant. It further appears that the sum payable as t from the date of execution to the stipulated date of pay- ras deducted as discount simultaneously with the advance. eader for the plaintiff attempts to support this practice by nce to the custom of bankers. Hence the questions to rmined in this case are the following :—

1st.—Whether interest can be recoverable from the date of l in the shape of discount, assuming any such custom to

2ndly.—Whether the publication of the rules as to interest g execution of the bill by the borrower do, as a matter , constitute a binding contract for payment of interest dently of proof of knowledge ?

3rdly.—Whether, supposing it does, the rule for payment rest at the rate of Rs. 3 per cent. per mensem can be

Referring the case the Judge cited a number of English an cases on the points submitted.]

Judgment of the High Court (1) is as follows :—

Regarding the first question, our answer is that it is not illegal t interest in the shape of discount from the amount t on a bill of exchange, if such deduction be made with knowledge and consent of the borrower, and under such nces as would not lead to the inference that unfair ad- was taken of the position of the borrower. In this case ot think that any such circumstance has been alleged or

Second question referred to us must be answered in the

Whether the creditors in this case are entitled to charge must depend upon the terms of the agreement between the The bill is silent upon the point, and it is for the Moon- g the case to decide upon the evidence whether there is ract between the parties for the payment of interest: tence of the contract in question has been established,

(1) MITTER and MACLEAN, J.J.

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TIPPERAH
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GOUR
CHANDRA
BARMAN.
Judgment.

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 TIPPERAH
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 CHANDRA
 BARMAN.
 Judgment.

the plaintiffs are entitled to recover interest at the stipulated between the parties.

Most of the cases quoted in the order of reference are inapplicable. Probably the Moonsiff had not the original reports before him. We think it right to draw his attention to this fact, as his quotation of cases to which he had presumed no access has caused unnecessary delay in the disposal of reference.

[EXTRAORDINARY CIVIL JURISDICTION.]

May 2. MUSSAMUT PURRUNJOTE AND ANOTHER . PLAINTIFFS
 AND
 DEON PANDAY AND ANOTHER DEFENDANTS

Application for transfer—Code of Civil Procedure, Act X. of 1877, section 23—Procedure.

The fact that a portion of property, the whole of which is situate in the Court of the Moonsiff of A, is of less value than the remaining portion which is within the jurisdiction of the Moonsiff of B, is not a sufficient ground for an application under the Code of Civil Procedure, section 23, for a transfer to the latter Court.

A party, applying under section 23, Act of 1877, must first of all give notice to the other side: the application should then be received by the Moonsiff and transmitted to the High Court through the District Judge.

THIS was an application on behalf of the defendants under section 23 of the new Code of Civil Procedure, to have the above mentioned suit transferred from the Court of the Moonsiff of Patna to that of the Moonsiff of Mozufferpore, on the ground that the portion of the property, the subject of this suit, which is situate in Mozufferpore, is of more value than the portion situate in Patna.

The application was in the first instance made to the Moonsiff, who directed that it should be made to the High Court.

Baboo Aushoolosh Dass, for Defendants.

The judgment of the High Court (1) was delivered by

AINSLIE, J. :—

The application must be rejected. The petition presented to the Moonsiff does not contain grounds upon which this Court can make an order for the transfer of the case from the Court in which it has been instituted to another Court. The proceedings of the Moonsiff are not according to the provisions of section 23 of the Code. A party applying under that section must first of all give notice to the other parties in the suit of his intention to apply. That, it is said, was done in this case as the application was made in the presence of the other parties. The Moonsiff should then have received the application and transmitted it to this Court through the District Judge, with any counter-application or reply by any other party. For the purpose of enabling that party to put in a reply (if not put in on the first day as it ought to have been) he might have given a certain fixed time. This answer would then have come up with the original application to the Court. A copy of this order must be sent through the District Judge to the Moonsiff for his guidance in future.

(1) AINSLIE, J.

1878

MUSSAMUT
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v.
DEON
PANDAY.

Judgment.

AINSLIE, J.

[CIVIL APPELLATE JURISDICTION.]

1878
March 13.

KALICHURN DUTT AND OTHERS PLAINTIFFS;
AND
JOGESH CHUNDER DUTT DEFENDANT.

Refund of money paid in consequence of a decree which has been reversed—Suit for excess payments—Limitation—Act IX. of 1871, sch. II, cl. 118—Interest.

A got a decree against B for rent at an enhanced rate, on the 29th of June 1863, which decree was affirmed both in regular and special appeal, but was reversed by the Privy Council on the 5th of May 1873. Between the two dates just mentioned, A got sixteen other decrees for rent at the enhanced rate, based on the original one of the 29th of June 1863. A Full Bench having ruled that a suit for a refund of the excess rent would lie: *Held*, that such a suit must be brought within six years, under Act IX of 1871, sch. II, cl. 118 (Act X of 1877, sch. II, cl. 120). *Held*, also, that under the circumstances interest would be allowed on the money paid in excess.

REGULAR APPEAL from a decree passed by the Subordinate Judge of the 24-Pergunnahs.

This suit was brought for the refund of Rs. 9,321-4-4, and interest thereon, amounting in all to Rs. 18,498-12-3. It appears that defendant's predecessor instituted a suit for enhancement of rent in the Court of the Principal Sudder Ameer of the 24-Pergunnahs against plaintiff's predecessor, and obtained a decree against him on the 29th of June 1863. That decree was substantially confirmed by the Judge and the High Court with a very slight variation, but was reversed by the Privy Council on a decree made on the 5th of May 1873. In the meantime the landlord obtained sixteen other decrees for rent at the enhanced rate on the basis of the former decree, the amount of which was realised by execution.

Plaintiff's case was that the decree of the Privy Council on the 5th of May 1873 gave them a cause of action for a refund of the excess above the usual rent paid under execution of several decrees for rent. A Full Bench of the High Court

(GARTH, C.J., and JACKSON, J., dissenting) held that the suit would lie, (see 1 C. L. R., 5), and the case was then sent back to the Division Bench for the disposal of the points of limitation and interest.

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DUTT.
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Mr. Twidale and Baboo Chunder Madhub Ghose, for Appellant.
Baboo Prannath Pandit, for Respondent.

The following judgments were delivered by the Court (1):—

GARTH, C.J.:—

GARTH, C.J.

A majority of the Full Bench having decided that this suit lies, the only question which we have now to decide in this case is, whether the plaintiff is barred by limitation.

The claim being entirely one of a novel character, it is somewhat difficult to say what provision in the Limitation Act should be applied to it. The defendant's pleader contends that the suit is for damages for taking excessive rent, and therefore that Section 27 of the Rent Law is applicable. But I am clearly of opinion that this is not a suit for damages, or one coming at all within the scope of the Rent Law. There is also some difficulty in treating it as a suit for money had and received. The 60th Section of the Limitation Act provides, that in such a suit the time is to run, not from the time when the cause of action accrues, but from the time "when the money is received;" and the money claimed in this suit was no doubt received by the defendant at the time when it was paid under the decree. Probably the safer and more correct course is to hold, that it comes under article 1 of the Limitation Act, as being a suit for which no period of limitation is elsewhere provided. It certainly is a suit which has lately been quite unknown to the law, and which, therefore, could hardly have been in the contemplation of the Legislature at the time when the Limitation Act was passed. In that view the claim of the plaintiff is not barred.

As regards the question of interest, I think the Subordinate Judge's observations are very sensible. It may be doubted,

(1) GARTH, C.J., and McDONELL, J.

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 GARTH, C.J.

whether in such a case as this we have any power at all to award interest; but assuming that we have, I think that in the exercise of our discretion we ought to disallow the claim. It is clear that after the first decree for enhanced rent, the defendant was perfectly justified in obtaining the subsequent decrees, and in receiving the money under them; and no part of that money can be said to have been legally or morally due from him until the judgment of the Privy Council was given on the 25th of March 1873. No notice of that judgment was ever given to the defendant by the plaintiff in the present suit, nor was he informed in any way that he was expected to refund any portion of the money paid under the subsequent decrees, until the proceedings in this suit were actually commenced. Under these circumstances, I think it would be very unfair to award an interest against him. Both appeals are, therefore, dismissed with costs.

McDONELL, J. McDONELL, J. :—

I concur in holding that this suit comes under Article 118 of the second schedule of Act IX of 1871, and the consequently it is not barred by limitation. I also think that under the circumstances of the case, the Subordinate Judge used a wise discretion in disallowing the claim for interest, and therefore agree in dismissing both appeals with costs.

[CIVIL APPELLATE JURISDICTION.]

DHAGWAN CHUNDER DASS AND OTHERS . DEFENDANTS ;
 AND
 SADDUR ALLY AND OTHERS PLAINTIFFS.

1878
 March 14.

Regulation VIII of 1819—Putnee Talook—Sale for Arrears of Rent—Service of Notice—Sufficient Service.

Where the sale of a putnee talook for arrears of rent takes place under the provisions of Regulation VIII of 1819, due service of the notice, in the manner prescribed by the Regulation, is essential to the validity of the sale. There are provisions of the Regulation which are not considered essential, but these relate merely to the mode of proving or verifying the service of the notice.

It would be dangerous to leave it open to the Court, in each instance, to say whether what had been done was equivalent to the mode of service required by the Regulation.

Rajhab Chunder Banerjee vs. Brojonath Koondoo Chowdhry, 14 W. R., 489; *Mutty Lall Mookerjee vs. Chunder Madhub Ghose*, 9 W. R., 242; *Ram Sebak Ghose vs. Mun Mokiny Dossia*, 23 W. R., 113; 14 B. L. R., 394; L. R., 2 Ind. App., 74; *Pitambur Panda vs. Baboo Damoodur Dass*, 24 W. R., 129; considered and explained. *Gouree Lall Singh Deo vs. Joodi*htir Hasraa*, 25 W. R., 141, dissented from.

REGULAR APPEAL from a decree passed by the Judge of Merguaga.

This was a suit for possession of a putnee talook, and for setting aside an auction sale thereof, on the ground of fraud. The plaintiffs had been co-sharers in this talook with three of the defendants, Goluck Chunder Gohu, Cherag Ali, and Solimuddin Akhun, who were the recorded proprietors. The plaint charged that the named parties fraudulently made default in payment of the rent to the zemindar, who sold the talook under the provisions of Regulation VIII of 1819; and that at the sale they put forward other defendants as purchasers, the real purchasers being themselves.

The case turned upon whether the notice of sale had been properly served; and the evidence on this point was as follows :—

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The serving peon hung up one copy of the notice in the zadar's cutchery, and went with the other one to the house of G Chunder Gohu. Not finding him at home he handed the to one of his servants, who, on reading it, told him to inform other co-sharers. The peon then went to the house of C Ali who read the notice and gave a receipt. Thence he to the house of Solimuddin, but, as he was not in, the peon back to the house of Cherag Ali, who, with two others present, signed the receipt. The proprietors, whose names were not recorded, had had no notice given to them. The question was, was this sufficient publication of the notice Regulation VIII of 1819, section 8. The lower Court held that it was not, and gave a decree setting aside the sale. The defendants appealed.

Baboo Srinath Dass and Baboo Hurry Mohun Chucker
 for Appellants.

Baboo Mohiny Mohun Roy, for Respondents.

The judgment of the Court (1) was delivered by

GARTH, C.J. GARTH, C.J. :—

We do not think it necessary to go into the question whether has been fully dealt with by the Court below, as to whether was any *bonâ fide* service of notice in this case. If it is for granted that every thing was done, upon which the appellants' pleader relies, we consider that there was no sufficient publication of the notice according to law.

The Regulation VIII of 1819, section 8, provides that notice, which the law requires to be sent into the Mofussil, be published by being stuck up in some conspicuous part of the cutchery, or at the principal town or village of the district talookdar. Then follow some provisions, to which it is not necessary for us to allude, in order that we may the better understand what we believe to be the meaning of the authorities to which we have been referred during the argument. These provisions

(1) GARTH, C.J., and McDONELL, J.

to the effect that the notice thus required to be published is to be served by a single peon, who is to bring back the receipt of the defaulter, or, failing this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been published on the spot. The section, therefore, provides, first, how the notice itself is to be served or published; secondly, what steps are to be taken for the purpose of proving the fact of publication.

Let us now turn to the authorities that have been referred to, and see what they decide. The first is a case of *Rajhab Chunder Mookerjee and others vs. Brojonath Koondoo Chowdhry and others*, decided by LOCH and DWARKA NATH MITTER, J.J., and reported 14 W. R., 489. It was a suit to set aside the sale of a putnee under Regulation XIX of 1819 upon several grounds. The lower courts had held that the sale was *bonâ fide*, and in all respects properly conducted by the zemindar. The High Court, however, on special appeal set aside the sale, upon the ground that the notice had not been duly published, according to the requirements of the section. They considered that the object of the section was both to give information to parties wishing to purchase, and to give proper information to the defaulter, that in the event the rent was not paid by a certain day the property would be sold, and, as we understand their judgment, they held that the publication of the notice in the way prescribed by the Regulation was imperative.

We now come to the case of *Mutty Loll Mookerjee vs. Chunder Lall Chose*, reported in 9 W. R., 242, and decided by Sir JAMES PEACOCK and Mr. Justice E. JACKSON. This was also a similar suit to set aside a putnee, and the Chief Justice, who delivered the judgment of the Court, says: "The material part of section 2, section 8, Regulation VIII of 1819, so far as this case concerned, is, that the notice required to be sent into the Mouda shall be served. The zemindar is exclusively answerable for the observance of the forms prescribed by that clause. The subsequent part of the section, which prescribes that the serving agent shall bring back the receipt of the defaulter, or of his manager, or in the event of his inability to procure it, that he shall obtain that which, by the Regulation, is substituted for it, is

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 ———
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merely *directory*, and, if not done, does not vitiate the sale provided the notice is duly served."

The due service of the notice was proved in that case, a question was, whether the sale was vitiated by the proof with regard to the verification of the service not being duly served. But we think that the only reasonable inference can be drawn from the language of the Court is, that due service of the notice was essential to the validity of the sale; that, as long as that service is effected, the provisions relating to the verification of the service are merely *directed* that the non-observance of those provisions would not vitiate the sale, provided the notices were duly served.

The next is the case of *Rum Sebak Ghose vs. Mus J. Dossia*, decided by their Lordships of the Privy Council, reported in 23 W. R. 113; 14 B. L. R., 394; L. R., 2 Ind. A. There again, there had been a proper service of the notice, and the only question was, whether the fact of one of the witnesses who had been called upon to verify the service, not being a substantial man, was sufficient to vitiate the sale. In that case their Lordships quoted with approbation the passage which we have extracted from the judgment of Sir BARNES PEACOCK, and with it.

They say: "Their Lordships are disposed to agree with the judgment of the High Court, as delivered by Sir BARNES PEACOCK, confined as it is to cases where there is proof that notice was duly served." We certainly understand this to mean that the proper service of the notice is essential, although the mode of verifying it is not.

The only case which would seem to throw any doubt on this view of the matter, is that of *Gouree Lall Singh vs. Joodishtir Hazrah*, reported in 25 W. R., 141, decided by their Lordships and MITTER, J.J.

In that case the notice had been served in the first instance at the cutchery, but it was then taken down and served on the defaulter himself, and it was contended that under the circumstances the service was bad. Mr. Justice MITTER held that the service was not effected as required by the Rules, but he seemed to think that Sir BARNES PEACOCK had

that actual service at the cutchery was not necessary. His Lordships are: "It has been decided by Sir BARNES PEACOCK, C.J., in a case reported in page 242 of the 9th vol., W. R., that a putnee should not be set aside for mere formal defects in the publication of the notice, if it be proved that it has been served upon the defaulter. That case has been quoted with approbation by their Lordships in the Judicial Committee of the Privy Council, in the case of *Ram Sebak Ghose vs. Mun Mohiny Dossia*, reported in page 113, W. R., vol. 23. This view of the law has been taken by a Division Bench of this Court in the case reported in page 133, W. R., vol. 24." The learned Judge goes on afterwards to say, that section 14 of this Regulation gives to the defaulter the right of contesting the validity of the sale only upon "a sufficient plea" being established, and he proceeds to consider, whether in that particular case, the plaintiff had established "a sufficient plea" to set aside the putnee, whether service upon the defaulter, under the particular circumstances of that case, was an equivalent for the mode of service required by the Regulation, and whether the defaulter has any right to complain. We venture to think that the law laid down by Mr. Justice MITTAL, and assented to by Mr. Justice GLOVER, is not quite in accordance with the views expressed by Sir BARNES PEACOCK and by the Privy Council in the cases to which we have alluded, nor with the decisions of MONTIFEX and LAWTON, J.J., in the case of *Pitambur Panda Baboo Damoodur Dass*, 24 W. R., 129, 133. It appears to us that, in all those cases, the due service of the notice in the manner prescribed by the Regulation was held to be essential to the validity of the sale, and that the provisions which are considered as non-essential are those relating merely to the mode of proving or verifying that service.

It seems to us, that it would be very dangerous to leave it to the Court in each instance to say whether what has been done is equivalent to the mode of service prescribed by the Regulation. But assuming, for the sake of argument, that the Court admits of any equivalent for actual service of the notice, we consider that in this case there was no such equivalent. There were here three persons, whose names were entered in

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the zemindar's sherishta, as owners of the tenure. Upo
 of these there was personal service effected; another was
 through one of his servants; and the third was not ser
 all. The only thing that can be said with regard to the
 is, that he admits some service having been effected upon
 one some time in the month of Kartick. It also appear
 there were other persons interested in the tenure who
 never served with any notice, so that what Mr. Justice M
 considered equivalent to a service at the cutchery has not
 effected here. The appellant has, therefore, failed to mak
 any case, even assuming the truth of his evidence. The
 is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

April 3. BABUR MEAH DEFENDANT
 AND
 JUMUN MEAH PLAINTIFF

Arbitration—Award—Appeal—Act VIII of 1859, section 3.

It was decided by the Full Bench in *Lalla Ishuree Pershad
 Bhunjun Tewares*, 15 W. R., 9 F. B., that the question of the
 of a legal award is one which is open to appeal; but that when
 tence of the award has been finally determined and judgment is
 accordance with the award, then there is no appeal.

SPECIAL APPEAL from a decree passed by the
 Shahabad, affirming that of the Subordinate Judge
 station.

This was a suit for the enforcement of an arbitration.
 The defendant denied the making of the award, or the ex
 any agreement to refer. The Subordinate Judge found
 plaintiff and defendant had entered into an agreement
 had appointed arbitrators, and that these arbitrators
 a valid and proper award. He decreed the plaintiff's claim
 defendant appealed. The Judge held that the decision of
 Bench in the case of *Lalla Ishuree Pershad vs. He*

tree, 15 W. R., 9 F. B., and the terms of Act VIII of 1859, 1878
 on 327, showed that the judgment of the lower Court was BABUR MEAH
 , and that he could not entertain the appeal. Defendant JUMUN MEAH,
 brought this special appeal.

Shoo Tarucknath Dutt, for Appellant.
Shri, for Respondent.

The judgment of the High Court (1) is as follows:—

It appears to me that the Judge has entirely misunderstood the *Judgment.*
 of the Full Bench decision in 15 W. R., 9 F. B.—*Lalla*
ee Pershad vs. Hur Bhunjun Tewaree. It was there decided
 the question of the existence of a legal award is one which
 can be appealed; but that when the existence of the award has
 finally determined, provided that the judgment is in
 accordance with that award, there can be no appeal from that
 judgment. The case must go back to the lower Appellate Court
 for reconsideration. Costs will follow the result.

(1) AINSLIE and McDONELL, J.J.

[CIVIL APPELLATE JURISDICTION.]

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April 5.MOHIMA CHUNDER DEY SIRCAR AND }
OTHERS } DEFEND

AND

HURRO LALL SIRCAR AND OTHERS . . . PLAINTI

*Suit for Possession—Title and Possession—Possession of jungle land
Limitation—Pottah—Evidence—Boundary dispute.*

Where a suit is brought for possession of land capable of cultivation, and which has actually been occupied, the plaintiff must show (1) possession within the period of limitation, and (2) title; and these questions should be dealt with separately. Where, however, the suit is for waste or jungle lands, it is often impossible to give evidence of acts of ownership or of possession, because the property is uninhabited and uncultivated, and no acts of ownership have been exercised over it: in such cases it is often necessary to prove title with very slight evidence of possession, and sometimes proof of the adjoining land coupled with clear proof of title, is sufficient to show that the party who has the title has also the possession.

If A and B are neighbouring proprietors, and a suit for possession of a strip of land is brought against B by A's lessee, who has a pottah of the land in dispute which had been granted by A's predecessors, that pottah is of no value as evidence of title unless it is shown that A's lessee has been in possession under it.

APPEAL under section 15 of the Letters Patent, from a judgment passed by Mr. Justice AINSLIE.

This was a suit for possession of a strip of land lying between the boundary between two talooks. The plaintiff claimed that the land belonged to a talook called Ram Gobind Aich. To prove this he put in evidence a pottah, dated the 7th of April 1821. This pottah had been filed in a suit, which the proprietor of talook Ram Gobind Aich had brought for possession of that talook against one of the defendants in the present suit, Shib Soondury. The plaintiff produced witnesses who testified to the fact of his having been in possession of the disputed lands down to the year 1281, when, as he

the defendant dispossessed him. The defendant produced witnesses who swore to his possession for more than the last twelve years, but produced no reliable evidence of title. The Moonsiff considered that the witnesses on both sides were equally untrustworthy, but gave a decree for the plaintiff on the ground that the pottah which he had produced in evidence was a genuine document, which showed that the plaintiff was entitled to the lands.

On appeal, the Subordinate Judge considered: (1) that the genuineness of the pottah had not been sufficiently proved; (2) that, admitting its genuineness, it was of no use to the plaintiff unless he could show *aliunde* that his landlords who granted it were entitled to the lands comprised in it; and (3) that no such evidence had been given. He, therefore, held that the plaintiff had shown no title to the lands; and, as the evidence to plaintiff's possession had been found to be unreliable, reversed the decision of the Moonsiff and dismissed the suit. Plaintiff specially appealed to the High Court, when the following judgment was delivered by

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Statement.

AINSLIE, J. :—

AINSLIE, J.

The question in this case is merely one of boundaries. The plaintiffs claim a certain small portion of land, one bigha and ten cottahs, as belonging to an *osul* talook, namely, talook of Gobind Aich, in the 18½ gundas, 7 gundas and 6½ gundazemindari of Pergunnah Saleemabad. The defendants deny that the land in suit is situated within that talook, and claim it as appertaining to a different estate. Each party brought into court witnesses to establish his own possession. The Moonsiff, as regards the question of possession that the witnesses called on either side give evidence in support of the side by whom they were called, and that the evidence is so far balanced that, taking it by itself, it would be difficult to elect the evidence of either side as superior to that on the other; but he goes on to say that, if that evidence be weighed with the evidence of title, it seems to him that the plaintiffs were in possession." The test which he applies to the credibility of the witnesses is one which is very commonly and very properly applied, when direct evidence of possession is so evenly balanced that the Court is unable

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to determine which side should preponderate. A very good test is to see whether other facts have been proved by independent evidence and fairly established to the satisfaction of the Court, and if so, how they bear on the direct evidence of possession. If there be such facts the Court compares the evidence of possession with those established facts, and sees which side agrees best with those facts. If the evidence of one side is consistent and that of the other inconsistent with the facts established, it is perfectly reasonable to say that the evidence which is inconsistent must be rejected. The Moonsiff has also found distinctly that certain pottah produced by the plaintiff, bearing date the 26th of Bysack 1228, covers the land in dispute. That pottah contains a description by boundaries of the land leased, and the Moonsiff shows that those boundaries do really include the land which is claimed in the present suit.

The Subordinate Judge in dealing with this case has taken the evidence of possession and title separately. He says that "the evidence of possession adduced on behalf of the plaintiff is reliable and satisfactory. The witnesses are persons mostly under the influence of the plaintiff, and their testimony is discrepant. The lower Court also does not seem to place much reliance on the said testimony, but it accepts the same simply because it considers that the plaintiffs have succeeded in proving their title." Evidently he did not see the force of the Moonsiff's argument, and the propriety of the test which the Moonsiff applied to the evidence. He has dealt with the different points of the evidence separately, and taking them piecemeal, he has been unable to say that one part is sufficient to support the case of the plaintiffs. If the whole evidence should be looked at together. It may be that each part is insufficient by itself to carry a decree, but that when all the parts are intertwined they prove sufficient for the purpose. Then he goes on to say as to the question of title that he is of opinion that the plaintiffs have not been able to furnish the needful evidence in support of their right, and he observes that "the first Court has assumed the pottah of 1228 to be genuine, because it was proved in a former suit, but on reading the judgment in the said case I am unable to find any explicit decision as to the genuineness

pottah." It may be that the Subordinate Judge is perfect-right in that matter, but this is wholly immaterial, provided there is no explicit finding against the genuineness of the pottah. The age of this document is beyond dispute, and that it has been in the last thirty-four years in proper custody is evident from its production in this suit and in the former suit in 1248. The pottah, moreover, of the pottah is carried back twenty years, as shown by the Moonsiff. It must be presumed that the pottah is a genuine instrument executed by the persons whose names it purports to bear. This being so, in the absence of anything to show that there was any dispute or any thing likely to lead to the fabrication of false evidence, it seems to me that the Subordinate Judge was wrong in not allowing any weight at all to this pottah, as proof of the title of the plaintiff.

Therefore, he is wrong in saying that there is admittedly no evidence on behalf of the plaintiff to show that the land is situated within the said talook and zemindaree. The pottah is in fact evidence that the land is so situated. He goes on to say "granting for arguments sake that the plaintiff got an talookdaree pottah, they cannot succeed on the strength of the pottah unless they can establish the right of their lessor or his to grant that pottah when that right is denied." The fact that fifty-four years ago certain persons dealt with this land as if it belonged to themselves is a relevant fact from which, in the absence of evidence on the other side to explain it, the Subordinate Judge ought to have inferred as the Moonsiff did infer, that they understood themselves to have and acted on the honest belief that they had a good title to the land, and this is admissible in evidence to show that the land was theirs. It seems to me that the Subordinate Judge's judgment stands on all the points on which he differs from the Moonsiff. It must, therefore, be set aside, and the judgment of the first instance affirmed with costs in this and in the lower Appellate Court."

The Respondents appealed under section 15 of the Letters Patent.

For Boykunt Nath Dass, for Appellants.

For Bhobun Mohun Dass, for Respondents.

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The judgment of the Court (1) was delivered by

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GARTH, C.J.,

GARTH, C.J.:—

We think that there is no sufficient ground in this case adopting the judgment of the Moonsiff, to the exclusion together of that of the Subordinate Judge. Assuming that the latter has committed an error of law, it appears to me amount to this: that he has failed to attribute proper weight to the pottah which has been produced by the plaintiffs, and neither he nor the Moonsiff have dealt quite properly with the plea of limitation. These errors, we think, would only afford ground for remanding the case to the Lower Court for consideration, and we therefore propose to take that course. The following remarks.

The question of limitation as it seems to us has not sufficiently distinguished in either of the lower Courts the question of title. In some cases, as for instance, when grants or leases have been made of waste or jungle land, the right to those lands is disputed, it is often impossible to give evidence of acts of ownership or possession over the land, because it is uninhabited and uncultivated, and no person's ownership by any one have been exercised over it. In such cases it is often necessary for the purpose of deciding the question of limitation, to rely upon very slight evidence of possession, sometimes possession of the adjoining land coupled with evidence of title, such as grants or leases; and the Courts are justified in presuming under such circumstances that the party who has the title has also the possession. But in the case like the present, where the land in question appears to have been occupied, it is generally proper to deal with the question of possession, for purposes of limitation, as distinct from the question of title. It very frequently happens that the title to land is committed to be in one person, whilst a twelve years' possession by another person has barred that title; and in this case it will be, that the pottah under which the plaintiffs claim is a perfectly genuine instrument, but that the defendants

(1) GARTH, C.J., and McDONELL, J.

plaintiffs have, by adverse possession for twelve years, excluded the defendants from their right.

If the land in question is capable of occupation, and has been actually occupied, as we presume to be the case, the question of limitation may and ought to be dealt with separately from the question of title.

Then again in dealing with the question of title, it must be borne in mind that the pottah of 1821, although proved to be genuine, would, as against the principal defendants, be no evidence, unless it were shown that the plaintiff or their predecessors in title, at some time or other since 1821, had been in possession under it. The pottah is merely a lease granted by the owners of an estate to the plaintiff's ancestors of a piece of land including the land in dispute. But this grant would be evidence of title to that land, as against the owners of an adjoining estate, unless possession under it were proved. Coupled with possession, the pottah would add great strength to the plaintiff's evidence.

Then as regards the proof of the pottah, if it can be shown to have been for thirty years in the custody of the plaintiffs or their predecessors in title, and was produced by them at the trial, the Court might presume that it was duly executed by the person or persons who profess to have done so; and the fact that it was produced in the former suit in 1848, would be evidence of its authenticity, although (*per se*) no evidence of title against the defendants.

From these remarks it will appear that the evidence of the plaintiff's possession ought carefully to be investigated and weighed, both on the question of title and also on that of limitation. The Subordinate Judge, if he thinks fit, may receive either evidence of possession on either side. The costs in all Courts will follow the result of the trial on remand.

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v.
HURRO
LALL SIRCAR.

Judgment.

GARTH, C. J.

[FULL BENCH.]

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June 3.

{ SHEIK GANI MAHOMED DEFENDANT
AND
T. D. MORAN PLAINTIFF
.
{ DURGA PERSHAD MYTI DEFENDANT
AND
{ JOY NARAIN HAZRA PLAINTIFF

*Suit for a Kabuliat—Suit for Rent at enhanced Rate—Payment
separately—Joinder of Co-sharers—Enhancement—Kabuliat*

Where an entire tenure was originally held by a tenant and co-sharers at an entire rent, and by an arrangement among themselves, consented to by the co-sharers on the one hand and the tenant on the other, the latter had been in the habit of payment of the rent to each co-sharer in respect of his separate share. *Held*, that under such an arrangement each co-sharer might bring a separate suit against the tenant for his share of the rent, but the existence of such an arrangement only will not justify one in bringing a suit for a kabuliat at an enhanced rent for his entire share of the tenure, or in bringing a suit to enhance the rent of the kabuliat separately, without making the other co-sharers parties to the suit. *Gunga Narain Doss vs. Sharoda Mohun Roy*, 12 W. R., 243; *Misra vs. Croudy*, 15 W. R., 243; *Dino Chowdhry vs. Dutt*, 19 W. R., 168; *Lulun vs. Hemraj Singh*, 20 W. R., 168; *Chunder Doogur vs. Bindabun Tewarse*, 15 W. R., 21 F.; *Soondery Dabee vs. Watson*, 11 W. R., 25; *Romanath Chand Hures Bhooya*, 14 W. R., 432; cited and explained.

THESE were two appeals under the 15th section of the Patent. One from a decree passed by Mr. Justice affirming that of the Subordinate Judge of Midnapore; other from a decree passed by Mr. Justice WHITE, affirming that of the Officiating Judge of Assam Valley.

Both of these cases having been taken on appeal to the Chief Justice, Sir RICHARD GARTH, and Mr. Justice BRIDGES, were referred to a Full Bench in the following terms:—

As the question in each of these cases is of a somewhat similar nature and seems to depend upon the same principle, and as on looking

cities there appears to be some difference of opinion in this Court on the subject, we think it right to refer both cases to the decision of a Bench.

Letters Patent Appeal No. 1713 of 1876—*Gani Mahomed Sheik vs. a*, the suit was brought by an ijaradar against a ryot for a kubuliat at a fixed rent. The plaintiff had taken an ijara, for a term of years, of a portion of an undivided estate. The defendant was the tenant of a nankar within this estate at a rental of Rs. 16-8, and it has been found that, some years before the suit, he had been paying Rs. 8-4 separately to Nund and Anundo Moyi, who were the owners of one moiety of the estate. The lower Court held that, as he had thus paid a separate rate to the plaintiff's lessors, the plaintiff was entitled to sue him for a kabuliat, and decided accordingly, which decree was upheld by Mr. Justice J. The case of *Roma Nath Buxhi vs. Chand Huri*, and others, 14 W. R. 432, is an authority in favour of that position, and the case of *Surut Dabee vs. Watson and others*, 11 W. R., 25, seems opposed to it.

Letters Patent Appeal No. 2601 of 1876—*Durga Pershad Myti vs. Grain Harra*, the suit was brought by an ijaradar of a one-third share in an undivided estate to recover, at an enhanced rate, one-third of the rent now held by the defendant within that estate. It was found that the defendant had, for some time, been paying his one-third share of rent separately to the plaintiff's lessors, and the Subordinate Judge held that there was no objection to prevent the plaintiff from enhancing his share of the rent by a separate suit, inasmuch as his collections had been separate. In special leave we find that it was held by Justices KEMP and E. JACKSON, in *Ram Sircar vs. Gowhar Mundul*, 10 W. R., 300, that a suit to enforce a separate share of the rent of an undivided estate will not lie. It should be to enhance the entire rent of the estate. (See also per KEMP and GLOVER, 17 W. R., 314.)

Questions which we refer for the opinion of the Full Bench are:—

—Whether the ijaradar of a co-sharer of an undivided estate, who has made separate collections from the tenant of the whole estate, in respect of his share, can sue to obtain a kabuliat at an enhanced rent for his share of the tenure, the other co-sharers not being made parties to the suit?

—Whether the ijaradar of a co-sharer of an entire tenure, who at some time realized his rent separately in respect of his share, can enhance the rent of that share separately, without joining the other co-sharers of the tenure?

In *Tarini Kant Bhattacharji*, for Gani Mahomed Sheik, it was held that a suit by a sharer for a kabuliat in respect of his share would not lie. On the question of suing for a kabuliat for a fractional share, he cited—*Surut Seondery Dabee vs. Wat-*

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Statement.

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son, 11 W. R., 25; *Woodoy Churn Dhur vs. Kalee Tara Dossie*, 11 W. R., 393; and distinguished *Romanath Rukhit vs. Chand Huree Bhooya*, 14 W. R., 432; *Indur Chunder Doogur vs. Bindabun Tewaree*, 15 W. R., 21 F. B. On suing for a share of rent, or for enhancement of a share of rent—*Bhyrub Mundul vs. Gogaram Banerjee*, 17 W. R., 408; *Haradhun Gossamee vs. Ram Newaz Misery*, 17 W. R., 414; *Gunga Narain Doss vs. Sharoda Mohun Roy*, 12 W. R., 30; *Mahomed Sing vs. Musamat Mughy*, 1 W. R., 253; *Ramjoy Singh vs. Nagur Gaze*, 1 W. R., Act X., 68; *Anoo Mundul vs. Shaikh Kamalooddeen*, C. L. R., 248, 564; *Doorga Churn Surmah vs. Jampa Doss*, 21 W. R., 46; *Raj Chunder Mozoomdar vs. Rajaram Gope*, 1 W. R., 385; *Kureem Shaikh vs. Makhoda Soonduree Doss*, 1 W. R., 269; *Ram Chunder Banerjee vs. Ameer Mundul*, 22 W. R., 394; *Beer Chunder Jobraj vs. Tarinee Churn Roy*, 11 W. R., 46.

Baboo Amarendro Nath Chatterjee, for Moran, cited *Hills Ghose*, W. R., Sp. No., at p. 141; *Juggodumb Dossee vs. Haran Chunder Dutt*, 10 W. R., 109.

The judgment of the Full Bench (1) is as follows:—

We think that both questions referred to us should be answered in the negative. They both depend upon similar considerations, and must be governed by the same principles.

We understand that in both cases the entire tenure was originally held by the tenant under all the co-sharers at an entire rent; but that by some arrangement amongst themselves, consented to by the co-sharers on the one hand and by the tenant on the other, the latter had been in the habit of paying a portion of the rent to each co-sharer in respect of his separate share. Such arrangements are by no means unusual, and they may be evidenced either by direct proof or by usage, from which the existence may be presumed. But in either case they are perfectly consistent with the continuance of the original lease of the entire tenure; and the same consent of all the parties by which the arrangement was originally created, may at any time put an end to it.

(1) GARTH, C.J., JACKSON, MARKBY, AINSLIE and MITTER, J.J.

So long as it continues, however, it has been constantly held in this Court, and must be considered now as well established law, that each co-sharer may bring a separate suit against the tenant for his share of the rent. But in the absence of such an arrangement, it is equally clear that no such suit can be maintained. (See *Gunga Narain Doss and others vs. Sharoda, Mohan Roy and others*, 12 W. R., 30; *Sree Misser and others vs. Chowdy*, 15 W. R., 243; *Dino Chowdry and Dinonath Mookerjee vs. Doorgadass Dutt*, 19 W. R., 168; and *Lalun vs. Hemraj Singh*, 20 W. R., 76).

But a suit for a kabuliat under such circumstances by one co-sharer against the tenant is a very different thing from a suit for arrears of rent. The separate suit for arrears, as we have already said, is perfectly consistent with the continued existence of the original lease of the tenure. A kabuliat, by which an entirely new and separate tenancy is created, is obviously inconsistent with it. A suit for arrears deals only with the past. A suit for a kabuliat binds the tenant in the future. In fact it is binding upon both parties; because the co-sharer who obtains a kabuliat is bound, at the request of the tenant, to give him a pattah upon the same terms, and the grant and acceptance of a binding lease of the separate share cannot exist contemporaneously with the original lease of the entire jote. This is quite in accordance with the view of NORMAN, Acting C.J., and DWARKANATH MITTAL, J., in the Full Bench case reported in 15 W. R., 21—*Indur Chunder Doogur vs. Bindabun Tewaree*, in which Justice MITTAL points out the distinction between a mere separate payment of rent to a co-sharer and claim for a kabuliat to the separate share. (See also 11 W. R., 25).

The only authority to the contrary appears to be the decision in *BAYLEY and PAUL, J.J.*, 14 W. R., 432—*Romanath Rukhit Chand Huree Bhooya*, but it is not clear from that case whether the tenure had ever been held at an entire rent; and at any rate the distinction between a separate payment of rent by arrangement, and a binding lease of a separate share, does not seem to have been considered. Of course, if the original lease of the entire tenure is cancelled or put an end to by the consent of all the parties, the co-sharers and the tenant are at liberty to

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enter into any fresh contracts which the law allows; but no Court of Justice ought to presume such a cancellation or termination of the lease, from the mere fact of a separate payment of rent to one or more of the co-sharers.

The right of one co-sharer to enhance the rent of his share separately must be governed by the same principles as his right to a kabuliati. The Rent Law in our opinion does not contemplate the enhancement of a part of an entire rent; and the enhancement of the rent of a separate share is inconsistent with the continuance of the lease of the entire tenure.

In each of the separate appeals therefore 1713 and 2601, the judgments of the lower appellate Court and of the High Court will be set aside, and the plaintiff's suit in each case will be dismissed with costs in all the Courts.

[CRIMINAL REVISIONAL JURISDICTION.]

May 9. IN THE MATTER OF BEPUTOOLLA COMPLAINTANT
vs.
NAJIM SHEIKH AND OTHERS ACCUSED.

Section 222, Code of Criminal Procedure—Summary Trial—Jurisdiction—Police investigation—Discharge by Magistrate of persons sent in by Police.

It is the nature of a complaint which should determine whether a case should be tried summarily under section 222 of the Code of Criminal Procedure. Where the acts complained of amount to an offence which a Magistrate cannot try summarily, he is not competent to hold a summary trial.

In the matter of *Dwarkanath Mojoomdar*, 21 W. R., 89, and *Chand Seekor Thakoor*, 22 W. R., 29, followed.

When a Magistrate has referred a case for Police investigation and the Police arrest certain persons and send in evidence against them, he is bound to consider that evidence before he discharges them.

THIS was a case referred by the Sessions Judge of Mymensingh to the High Court, as a Court of Revision, that certain orders passed by the Magistrate, convicting some persons and granting summary trial and discharging others, might be set aside as contrary to law.

The facts of this case are sufficiently shown in the judgment of the High Court (1), which was delivered by

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v.

NAZIM
SHIKH.Judgment.

PRINSEP, J.

PRINSEP, J. :—

It appears that one Beputoolla complained to the Magistrate that Nazim and Immam Buksh had carried off and beaten him and his brother Alimooddin some thirty days previously. After recording his examination the Magistrate ordered a Police investigation. While that investigation was proceeding, Alimooddin died, and the Police arrested and sent in Idhur and Ranoo, accused of culpable homicide and wrongful confinement.

The Magistrate discharged these two men with the following order:—"I find the Police have sent up Idhur and Ranoo who were never accused. They must be discharged, and the Police directed to send up Nazim and Immam Buksh who alone were accused. The case is one under section 341, and cannot be exaggerated to anything more."

The Magistrate then in a summary trial convicted Nazim and Immam Buksh under section 341 of wrongful restraint, and, in doing so, remarked: "Considering the nature of the oppression and that the complainant and his brother were probably beaten, I must pass something more than a nominal sentence." The sentence passed was Rs. 25, or in default seven days' imprisonment.

The case has been referred to us by the Sessions Judge, because he considers on the authority of the cases reported in 21 F. R., 89, and 22 W. R., 29, that the offence has been wrongly tried in a summary manner, the offences originally charged being such as could not be so tried.

There can be no doubt that some of the acts originally complained of amounted to an offence (wrongful confinement) which the Magistrate could not try summarily, and that it has been held in the cases quoted, in which we agree, that it is the nature of the complaint made which should determine whether the case should or should not be tried summarily. Therefore the Magistrate's proceedings were altogether irregular as regards the two persons whom he convicted of wrongful restraint.

(1) MARKBY and PRINSEP, J.J.

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We observe, however, that the Magistrate has distinctly found that the death of Alimooddin after some interval cannot be attributed to any injuries received in the commission of the offences complained of.

Judgment.
PRINSEP, J. As regards Idhur and Ranoo who were sent in under arrest by the Police after the investigation ordered by the Magistrate, we cannot find any order of the Magistrate directing this enquiry. We are inclined to think that the Magistrate ordered this investigation under section 146, because he saw cause to distrust the complaint made to him; but however that may be, the Police officer was competent and acted perfectly correctly in arresting those against whom, in his opinion, the offence was proved. The reasons assigned by the Magistrate for releasing these men are altogether insufficient, though it was open to him, and he may have intended to discharge them because he did not believe that they were implicated, inasmuch as they were not named in the first complaint. At all events, with the Police report and the evidence on which these persons were arrested before him, he was bound to consider that evidence before him and summarily discharged these men.

Having pointed out the law, and considering the time that has passed, as well as the nature of the offence, and that the accused convicts have not practically been prejudiced, we think it unnecessary to re-open these proceedings.

[CIVIL APPELLATE JURISDICTION.]

DHA MOHUN ROY AND OTHERS PLAINTIFFS;

1878

AND

CHUNDER DASS AND ANOTHER DEFENDANTS.

April 1.

Presumption of ownership—Adjoining Buildings—Walls of adjoining buildings built on same foundation—Light and air—Obstruction.

Where the external walls of two adjoining houses which now belong to different owners, but which at one time were the property of the same person, have been erected wholly or partly on the same foundation wall, and there is an entire absence of evidence on either side as to the dates of the several purchases or of the terms on which they were made, the presumption is that the line of demarcation of the two properties is that indicated by the superincumbent walls.

SPECIAL APPEAL from a decree passed by the Judge of the District Court, reversing that of the Sudder Moonsiff of that district.

In this case it appeared that the defendant has a house in the city of Dacca called Rung Mehal. The east wall of this house, from the top nearly to the level of the ground, is of ordinary thickness, but thence down to the bottom of the foundation is thicker, so that this latter portion projects beyond the external face of the upper portion of the wall. Adjoining is a house belonging to the plaintiff called Tripuli, the west wall of which was built partly on a foundation of its own and partly on the projection above mentioned, and was built close up to the east wall of Rung Mehal. The walls of the two houses were built one story high, and a flat roof was placed over Rung Mehal; but on the walls of Tripuli there were placed high pillars, and on these pillars the roof was laid. Thus the roof of Tripuli was one story higher than that of Rung Mehal, the second story being open on all sides. It was admitted that the two houses were built by, and at one time were the property of, the same person from whom the predecessors of the parties had purchased separately. But no evidence was given as to the dates of those purchases or of the terms on which they were made.

At no time before the institution of this suit, the defendant,

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the owner of Rung Mehal, began to add a second story house, and in carrying up the east wall he encroached upon so much of the west wall of Tripuli as rested on the section, in order to make the new portion have the full of the foundation wall. In doing this he darkened the west of the second story of Tripuli; and plaintiff now seeks a mandatory injunction to compel the defendant to remove the wall, and for damages for the trespass and the deprivation of light and air. The Moonsiff gave plaintiff a decree, but his decision was reversed by the District Judge. Plaintiff brought this special appeal.

Baboo Hem Chunder Bannerjea and Baboo Chunder Ghose, for Appellants.

Branson, for Respondent. Baboo Mohiny Mohun Roy and Baboo Bussunt Coomar Bose, for Respondent.

The following judgments were delivered by the Court:

MARKBY, J. MARKBY, J. :—

This is a case of very considerable difficulty. It appears that there are in the town of Dacca two buildings, one called Tripuli, now belonging to the defendants. A very long time ago the houses belonged to, and were built by, one owner. There are indications that Rung Mehal was built first, and it is now used as having been originally a long narrow one-storied hall, used for *nautches* and such like entertainments. It is now a dwelling house. Tripuli is described as having a large gate-way with a single chamber above the gate, open on both sides. It is also said to be now in a half-ruined state, the upper roof is falling in, and that the only means of getting to the upper story is by a rickety bamboo ladder; but the defendant says that the building is sound and it might be put in repair. It is further said by the District Judge that it is "not shown that the original use of Tripuli, probably it was originally built as a *bathkhana*, and was intended to serve as an entrance gate to the house." I gather that at present it is not inhabited or used.

(1) MARKBY and PRINSEP, J.J.

The dates of the respective purchases by the plaintiffs and defendants are not stated, nor has either party produced any conveyance. It is however admitted that the parties or their predecessors have been in possession for much longer than twenty years, both houses having been built during the unity of ownership. I do not think it makes any difference in the result of this case, which of the two purchases was made first, though it might make some difference in the language to be used in defining the legal rights of the parties. For the sake of convenience, I shall speak of the rights of the parties under those purchases as if they were acquired simultaneously.

The defendants have now built a wall on the east side of their premises and in front of the plaintiffs' premises; and one complaint of the plaintiffs is, that the defendants have thereby diminished the light and air to which the plaintiffs are entitled in respect of the chamber over the gate-way above described. They say that they have a right to the free passage of light and air which the defendants have thus obstructed, and upon this they insist upon the defendants' new wall being pulled down. The District Judge has found as a fact that the plaintiffs have, notwithstanding the building of this wall, light and air sufficient for the convenient habitation of this chamber, and he has found that the plaintiffs have not a right to any thing more. (1)

I think that the plaintiffs have not shown any ground for interfering in special appeal with this finding, of which the defendants do not complain. The plaintiffs have not shown that the District Judge was bound in law to find that they had any more extensive right than this. No use was suggested for the chamber which could give the plaintiffs a greater right than a right for the purpose of habitation, and the plaintiffs not having produced any conveyance, the most they can say is, that they took the house from the former owner such easements as would, in the absence of any express stipulation, be implied from the nature of the building itself; and I do not think that more would be implied in respect of the matter now in dispute than that the owners of Rung Mehal should not do anything to prevent the

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(1) See, however, *Moore vs. Hall*, 3 Q. B. D., 178.

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plaintiffs from having sufficient light and air for the conv habitation of this room. The plaintiffs, however, say tha now claim since the severance of ownership by preser But I see no ground for saying that the District Judge wrong in law in saying that this is not the case. Wh extent of the easement, which may be gained by enjo as of right under section 27 of Act IX of 1871, is a qu which has not yet been determined, nor, in my op need it be determined in this case, for I see nothing which a claim, that the easements which originally pass the plaintiffs' house have been enlarged by the subsequen can be supported. That some light and air did in fact this side over the defendants' premises into the plaintiffs' is no doubt true; and that less light and air will now this direction than formerly is also, I think, evident. fact alone does not, in my opinion, compel a Judge to the plaintiffs are entitled to have a wall demolished w defendants have built upon their own premises, if this fact, what the defendants have done.

But the plaintiffs allege that the wall which the de have built is not in fact built upon their own premises, b those of the plaintiffs; that the building of the wall is ther itself a trespass, and that whether the plaintiffs have t ments which they claim or not, they have a right to dem the wall should be pulled down. Upon this part of I understand the facts to be that the eastern wall Mehal was originally built with a foundation which beyond the superstructure. When Tripuli was built, the wall of that building was placed partly upon this projec partly upon a foundation of its own. The defendants built and claim a right to build on the top of this west of the Tripuli house, as owners of the vertical space. The question therefore to be determined is this:—To wh the soil belong beneath the plaintiffs' western wall? If beneath that wall belongs to the plaintiffs, the defenda committed a trespass in building upon the plaintiffs' wa vertical column of space above the wall then belongs to t tiffs. If, on the other hand, the soil beneath the wes

the plaintiffs' house belongs to the defendants up to the extreme outside line of the original foundation of their house, for the purposes of the present case, I may assume that the defendants have committed no trespass, for, though the western wall of the Tripuli house (which is not a party wall) clearly belongs to the plaintiffs, yet the column of space above this wall at case belongs to the defendants as owners of the soil beneath it (*Corbet vs. Hill*, L. R., 9 Ex., 671). There is, I think, no doubt that this is the true question for our consideration, there is much difficulty in giving to this question its correct answer. It depends upon the inference which ought to be drawn from the grant to the defendant which was made when the Tripuli house was standing, for there is nothing to show that the rights of the parties have been since altered. The District Judge has found that the whole of the foundation originally built for the Rung Mehal is an essential part of that house and necessary for its safety. It is equally clear that that part of the foundation on which the western wall of Tripuli is an essential part of Tripuli and necessary for its safety. Each party, therefore, must have some rights over this part of the building. The question here is not as to these rights but as to the ownership of the soil under the foundation. On the whole, I think, the true inference as to this ownership is that the line of demarcation on this side between the sites of the two properties is that indicated by the superincumbent walls. Whatever comes under the east wall of Rung Mehal ought, I think, to be held to belong to the defendants, and whatever comes under the west wall of Tripuli, to belong to the plaintiffs. Being so, not only the western wall of their house but the column of space above that wall belongs to the plaintiffs as owners of the soil, and the defendants must be ordered to pull down the wall to the extent to which they have erected it upon the plaintiffs' wall. I see no reason to differ from the view taken by the District Judge as to costs. Each party will bear his own costs of this appeal.

PRINSEP, J. :—

of the same opinion.

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Judgment.

MARKBY, J.

PRINSEP, J.

[CIVIL APPELLATE JURISDICTION.]

1878
April 2.

LOOTNARAIN SINGH AND OTHERS DEFEND
AND
SHOWKEE LALL PLAINTIFF

*Ghatwal—Extinguishment of Superior tenure—Rights of under-
Zuripeshgi—Specific Relief Act I of 1877, Section 18.*

- A, holding a certain mehal as a ghatwal, mortgaged it to B of a *zuripeshgi* lease for 21 years. Shortly after the granting lease the zemindar got a decree against A, by which A's ghatwal was extinguished. In execution of that decree, the zemindar and took *khas* possession of the mehal. Some years afterwards zemindar granted to A a perpetual *mocurrari* lease of the same. Held, in a suit against A, instituted by the assignee of B's the *zuripeshgi*, that under section 18, Act I of 1877, A must his present estate in the mehal, make good the *zuripeshgi*.

REGULAR APPEAL from a decree passed by the First District Judge of Bhaugulpore.

On the 22nd of Jeit 1265 F., (20th of May 1858,) the defendants in the present suit mortgaged, by way of *zuripeshgi* for twenty-one years, a certain mehal to Dewan Rutun Lall. The mortgagors then held this mehal as ghatwals. On the 1st of July 1866, the zemindar, Raja Leelanund Singh, obtained a decree against the mortgagors by which their ghatwal was extinguished; in execution of that decree he turned the mortgagors out of possession on the 28th of December 1866. On the first of Assin 1281, the mortgagor received a perpetual *mocurrari* lease of the same mehal. On the 21st of Jeit 1274, the plaintiff in the present suit purchased a half share of the rights of Dewan Rutun Lall in the *zuripeshgi* of the mehal. Jeit 1265 F., and, making his vendor a *pro forma* defendant, sued for possession of that half share and mesue profits from the date on which the mortgagors took possession of the *mocurrari* lease, namely, the 1st of Assin 1281 F.

Baboo Kali Mohun Doss, Baboo Chunder Madhub Ghose, and Baboo Jogesh Chunder Dey, for Appellants.

Baboo Mohesh Chunder Chowdhry, and Baboo Taruck Nath Dutt, for Respondent.

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—
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The judgment of the Court (1) is as follows:—

The plaintiff's case was this, that the persons called the first defendants, or the first party defendants, who in former years held certain mehals, Goghuloch and others, as ghatwals, had granted to Dewan Rutun Lall, in the names of Lalla Sheo Sahoy and others, a farming lease for twenty-one years on receipt of *surripeshgi*; that the lessors were subsequently dispossessed as a result of a suit by the zemindar, Rajah Leelanund Singh, for the resumption of the ghatwali tenure, and the zemindar or persons claiming under him obtained possession in execution on the 9th of Magh 1276 F.; that, subsequently, the first party defendants entered into a compromise with the Rajah and gained from him a perpetual *mocurrari* lease, taking effect from the beginning of Assia 1281, and got the property into their exclusive possession, and have since been in enjoyment of the same. The plaintiff represents by purchase one-half share of the rights of the lessees of the 22nd Jeit 1265, and sues to recover possession to that extent, with mesne profits from the date on which the first party recovered possession, that is to say, Assia 1281.

The answer of the defendants was that, inasmuch as the title under which they had granted the lease in 1265 had come to an end and they were now holding on an entirely different footing, the plaintiff was bound to resort to the remedy provided by a clause of the lease dated 1265, by which the *ticcadars* in the event of dispossession were entitled to sue at once for the amount of *surripeshgi*, and that a suit for possession of the land could not be maintained. The Subordinate Judge, however, was of opinion that the conversion of *ghatwali* to *mocurrari* tenure did not relieve the mortgagor of the contract entered into between him and the mortgagee, and further that the mortgagor cannot by any art or devices of his put a stop to a contract which he solemnly

(1.) JACKSON and TOTTENHAM, J.J.

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stipulated with the mortgagee. He, therefore, ordered the case be decreed with costs, and interest at six per cent annum, and so forth. Now the defendants before us have sought to raise the same plea which they unsuccessfully raised in Court below, and it is contended that when the situation between lessor and lessee has been altogether changed, an *ghatwali* which the lessors originally enjoyed has come to an end, the plaintiff is not entitled to do anything more than sue for the amount which he advanced.

It appears to me that the judgment of the lower appellate Court is right. The case clearly falls within the equitable principle affirmed by section 18 of Act I of 1877. The lessors, when they granted the case in 1266, had an infirm title. They, since got into possession of the estate by a valid title, and are bound, I think, to carry out the contract to which the plaintiff has in part succeeded, because they are now in a position to do so. This being our view of the case, we were, on the consideration of certain circumstances, to order the stay of execution, and the parties now have agreed to the following: that the execution of this decree be stayed for three months from the present date to enable the defendants to re-pay to the plaintiff, as to his one-half share, the amount of advance originally made, together with interest thereupon from the time of the plaintiff's dispossession, that is to say, 1st Aasin 1276 to the date of payment, at the rate of 9 per cent. per annum, interest being allowed in lieu of *wasilat*. If this amount is paid within three months, the plaintiff will be entitled to the decree and obtain possession with *wasilat*. The plaintiff will get his costs of this appeal.

## [CIVIL APPELLATE JURISDICTION.]

AMTARAN KOONDOO . . . . . PLAINTIFF;

AND

HEIKH HOSSEIN BUKSH . . . . . DEFENDANT.

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April 5.*Setting claims—Distinct Accounts—Adjustment—Hathchitta—Relinquishment of part—Act VIII of 1859, section 7.*

A supplied B with gram to the value of Rs. 200, and with khesaree to the value of Rs. 600. The two accounts were kept distinct, but at the conclusion of the dealing the books were adjusted, and a *hathchitta* given by B to A for the Rs. 800. Notwithstanding the *hathchitta*, A sued B for Rs. 600, the price of the khesaree, in the Moonsiff's Court, and for Rs. 200, the price of the gram, in the Small Cause Court. The latter suit having been rejected at the instance of the defendant, who had objected that the suit should have been on the *hathchitta*, the Moonsiff allowed A to amend his plaint so as to sue on the *hathchitta* for the Rs. 800. *Held*, that the Moonsiff was right in doing so; and that the provisions of section 7, Act VIII of 1859, in no way prevented him from making the order.

*Mohamed Zahoor Ali Khan v. Mussamut Thakooranee Rutta Koor*, 11 Moore's Ind. Ap., 468, cited and followed.

**SPECIAL APPEAL** from a decree passed by the Second Subordinate Judge of the 24-Pergunnahs, modifying that of the Moonsiff of Sealdah.

Plaintiff is a dealer in country produce. He used to supply gram and khesaree for defendant's sheep. The two accounts were kept separate. In the month of Pous 1283, the two accounts were consolidated, and Rs. 815-10-7 was found due, for which defendant gave plaintiff a *hathchitta*. On the 16th of January 1877, the plaintiff instituted a suit in the Sealdah Munsiffi, against the defendant and his wife, for the sum of Rs. 650-12-0, the price of khesaree given to them; and a few days after he instituted a separate suit in the Sealdah Small Cause Court for the recovery of Rs. 164-14-7 in respect of gram. Hossein Buksh appeared before the Small Cause Court and objected that the suit instituted there could not proceed, inasmuch as he had given a *hathchitta* to the plaintiff, and would show that the two accounts were not separate but one

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account, and that there was a splitting of the cause of action. The Judge of the Small Cause Court held the objection to be valid and struck off the case under section 7, Act VIII of 1859.

Thereupon the Moonsiff allowed the plaintiff to file a supplemental plaint enhancing the claim by Rs. 164-14-7, struck the name of the defendant's wife off the record, and gave plaintiff a decree on the *hathchitta* for Rs. 815-10-7.

Defendant appealed to the Subordinate Judge, who decided that the claim for the Rs. 164-14-7, not being included in the original plaint, must be taken to have been abandoned under section 7, Act VIII of 1859—8 W. R., 12 P. C.; and that the lower Court was not warranted by law in allowing the plaint to be amended to the extent it did—6 W. R., 211.

The Moonsiff's decree was modified, and a decree given for Rs. 650-12.

Plaintiff then brought this special appeal.

Baboo *Durga Doss Dutt*, for Appellant.

Baboo *Gopaul Chunder Sircar*, for Respondent.

The following judgments were delivered by the Court (1):—

MARKBY, J. MARKBY, J.:—

It is impossible to distinguish this case from the decision in 11 Moore's Indian Appeals, page 468—*Mahomed Zahoor Ali Khan vs. Mussamut Thakooranee Rutta Koer*, 9 W. R., 9 P. C. The suit, as originally brought against nine persons, was held by the Privy Council to have been wholly misconceived, but they nevertheless thought that there was in all probability a good cause of action against one of those defendants upon a bond, and they upon they make this order. They say: "They have come to the conclusion that the fairer course is to do what the Judge of the Court of First Instance might under the Code of Civil Procedure have done at an earlier stage of the cause, namely, allow the appellant to amend his plaint, so as to make it a plaint against *Rutta Koer* alone for the recovery of money due on a bond." That is precisely what has been done here. The plaintiff originally su

(1) MARKBY and PRINSEP, J.J.

his khatta books. There was an objection by the defendant the plaintiff ought not to have sued upon his khatta books, but he ought to have sued upon the *hathchitta*. Whether was a valid objection or not we need not now consider, nor we consider whether it was that objection which induced plaintiff to take the course he did. What he did was this. He asked the Court to be allowed to sue upon the *hathchitta*. The Moonsiff, as he was clearly entitled to do under the authority of a decision I have referred to, allowed the suit to proceed upon the *hathchitta*, and the Subordinate Judge was wrong when he expressed an opinion that the Moonsiff was prevented from doing this by the provisions of section 7 of the Procedure Code. Section 7 applies to a totally different state of things, and in no way prevents the Moonsiff from making this order. The judgment of the lower appellate Court must therefore be set aside, and that of the Moonsiff restored. The case will stand decreed upon the *hathchitta* for the sum of Rs. 815-2. The special appeal will get his costs of this appeal and of the Courts

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MARKBY, J.:

PRINSEP, J.

The error of the Subordinate Judge seems to have been by his taking the causes of action to have been irrevo-  
cated by the execution of the *hathchitta*. As the suit was  
originally laid, the causes of action were distinct. When, how-  
ever, the plaintiff sued on the *hathchitta* they became united,  
and therefore, as the suit was originally laid, there was no relin-  
quishment within the terms of section 7 of the Code of Civil  
Procedure as has been held by the Subordinate Judge.



## [CIVIL REFERENCE.]

1878  
May 10.

KADARESSUR MOOKERJEA . . . . . PLAINTIFF

AND

GOOROO CHURN MOOKERJEA AND ANOTHER . DEFENDERS

*Small Cause Court—Jurisdiction—Implied Contract—Contract of Indemnity—Contract Act (IX of 1872) sections 9, 70.*

If A buys a tenure at a public auction *benamee* in the name of B, he impliedly contracts to indemnify B against the claims of the superior landlord; and a suit by B against A to recover the amount of a decree obtained against him by the superior landlord will lie in the Small Cause Court.

**R**EFERENCE under section 617 of the Code of Civil Procedure of 1877 from the Judge of the Small Cause Court at Furreedpore. The terms of the reference are as follows:—

“The plaintiff sues to recover a certain sum of money from the defendants in equal shares, on the allegation that the defendants having purchased at auction certain properties *benamee* in the name of the plaintiff, the superior landlords brought certain rent suits against him with respect to those properties and recovered decrees in execution whereof they realized from him the amount sued for. He says that, as he was a mere *benameedar* for the defendants, he is entitled to obtain reimbursement from them for the amount which he was obliged to pay on their account. The plaintiff’s suit was originally filed in the Court of the First Moonsiff of Bhangah but he returned it, being of opinion that the suit was cognizable by the Small Cause Court. The plaintiff was thereupon re-filed in the Bhangah Small Cause Court. One of the two defendants appeared and objected to the jurisdiction of the Small Cause Court to entertain the suit. As I am doubtful whether the suit is cognizable by the Small Cause Court, I beg respectfully to submit it for the opinion of the Honorable High Court, under section 22 of Act XI of 1865.”

[In referring the case, the Judge cited the following authority on the question as to whether the Small Cause Court has jurisdiction.]

iction :—Act XI of 1865, section 6; *Rambur Chittangeo vs. Adhoooodun Paul Chowdhry*, 7 W. R., 377; *Sreepully Roy vs. Isharam Roy*, 7 W. R., 384; *Bharat Chunder Dutt vs. Dengur Roy*, 7 W. R., 386; and section 70 of the Indian Contract Act.]

1878  
KADARISUR  
MOOKERJEE  
v.  
GOOROO  
CHURN  
MOOKERJEE.

Judgment.

The judgment of the High Court (1) is as follows :—

We are of opinion that this case has been rightly brought in Small Cause Court, being a suit on an implied contract with the meaning of section 9 of the Contract Act. Section 70 cited by the Judge, in our opinion, does not apply.

(1) MARKBY and PRINSEP, J.J.

### [CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF GANGOO SINGH AND OTHERS.

May 21.

Section 211, Penal Code—Order of discharge in original Complaint—  
When prosecution for false complaint may be instituted.

A Magistrate is not competent to discharge the accused in a warrant case and order the complainant to be prosecuted for making a false complaint, until he has examined all the witnesses cited by the complainant.

BE referred by the Sessions Judge of Gya to the High Court, as a Court of Revision, that the order of the Joint-Magistrate of Nowada, directing certain persons to be prosecuted for making and abetting the making of a false complaint, might be set aside as contrary to law.

The facts of this case sufficiently appear from the letter of the Sessions Judge :—

A petition was presented to the Collector of Gya by one Gangoo Singh and others, accusing a Kannugo, Bosarat Hossain, of extorting money from petitioners. This petition was forwarded to the Joint-Magistrate in charge of Sub-division of Nowada for investigation, and that officer, on April 5th, discharged the accused Basarat Hossain, and ordered the prosecution of three of the petitioners, Resal Singh, Gouri Sunkar and

1878  
GANGOO  
SINGH.  
Judgment.

Gangoo Singh, under sections 211 and 109 of the Indian Penal Code. "I am of opinion that the order of discharge and the order for prosecution under sections 211 and 109 were both illegal, and should be set aside on the following grounds, viz:—

1st. That the Joint-Magistrate had not examined all the witnesses named by the complainant, and who were present in Court. (See section 215, explanation 3, and cases of *Srinath Mundle*, 24 W. R., p. 62, and *Q. vs. Heera Lall Ghose*, 13 W. R. p. 37.)

2nd. That the sanction of the Collector was necessary under section 468 of the Criminal Procedure Code before a prosecution under section 211 could be ordered, inasmuch as the alleged offence (viz., the institution of a false charge) was committed in the Collector's Court in which the petition containing the charge was filed."

The following order was passed by the High Court (1):—

In this case, the investigation upon the complaint of Gangoo Singh and others not having been completed by the Joint-Magistrate, he should not have ordered the prosecution of the complainants under sections 211 and 109 of the Penal Code. We therefore set aside the order of the Joint-Magistrate ordering prosecution of the original petitioners before the Collector.

(1) MITTER and MACLEAN, J.J.

## [FULL BENCH.]

UNGIT SINGH AND OTHERS . . . . JUDGMENT-DEBTORS;  
 AND  
 BHARBAN KOER . . . . . DECREE-HOLDER.

1878  
 June 18.

*Appeal of Act—Appeal under Act VIII of 1859—Order made under Act VIII of 1859—General Clauses Act, Act I of 1868, section 6—Letters Patent, section 16.*

A special appeal lies from an order made under Act VIII of 1859 which would have been appealable under that Act, although the appeal was not presented until Act X of 1877 came into operation.

*Per GARTH, C.J., and JACKSON, J.*—The appeal in such cases is saved by the provisions of section 6 of the General Clauses Act, Act I of 1868.

*Per MARKBY, MITTER, and AINSLIE, J.J.*—The appeal in such cases is saved by the provisions of section 16 of the Letters Patent, *Ruttun Chand Shrichand vs. Hanmantrav Shindabas*, 6 Bom., H. C. R., 166; *Framji Bomanji vs. Hormanji Borjori*, 3 Bom., H. C. R., 49, cited.

THIS was a special appeal, No. 360 of 1877, from an order made by the Judge of Bhaugulpur, on the 23rd of August 1877, reversing an order of the Moonsiff of Begu Serai, which refused an application for execution of a decree on the ground of limitation. The new Civil Procedure Code came into force on the 1st of October 1877. The second appeal was filed in the Court on the 19th of November 1877. A special appeal from such an order lay under Act XXIII of 1861, section 11.

The question which was referred to a Full Bench (1) was—Does a second appeal lie under the above circumstances? The following judgments were delivered on this and the other appeals mentioned below :—

*GARTH, C.J. :—*

*GARTH, C.J.*

I think that the special appeal in this case is preserved to the appellant by section 6 of Act I of 1868, which is in these words :—

The repeal of any Statute, Act or Regulation, shall not affect

(1) *GARTH, C.J., JACKSON, MARKBY, AINSLIE, and MITTER, J.J.*

1878  
RUNGIT  
SINGH  
 v.  
MEHARHAN  
KORR.

Judgment.

GARTH, C.J.

any proceedings commenced before the Repealing Act shall have come into operation."

It was held by a Full Bench of the Bombay High Court in the case of *Ruttun Chand Shrichand vs. Hanmantrav Shivbata*, 6 Bombay High Court Reports, page 166, that a suit is a judicial proceeding, and that the words "any proceedings" in the above section included all proceedings in any suit from the date of its institution to its final disposal; and therefore included proceedings in appeal. I quite agree in that view of the section. The suit was instituted before the new Civil Procedure Code came into operation; and I consider that by force of the above section, the proceedings in this suit, including the special appeal which is an essential part of those proceedings, are to go to the final end of the suit, notwithstanding the repeal of the Code.

There is nothing in the new Code, as far as I can see, which militates against this view. Section 3 certainly provides that "nothing contained in the new Code shall affect the procedure prior to decree in any suit instituted before that Code comes into force;" and the reasonable inference from these words is, that the new Code is to affect the procedure *after decree* in any suit. But I do not read the word "procedure" in this section as meaning the same thing as the word "proceedings" in section 6, Act I of 1868. The proceedings in any suit commenced before the new Code comes into operation are to go on as before, including a special appeal, if the old Code allowed it, but the "procedure," which I understand to mean the machinery by which those proceedings are conducted, is, after decree, to be that which is provided by the new Code. If there is no machinery provided by the new Code in case of a special appeal like the present, the old machinery must be used.

I am aware that in a case of *Framji Bomanji vs. Horabharjori*, 3 Bombay High Court Reports, 49, the word "procedure" is used by Sir R. COUCH in a more extended sense; but the decision in that case did not depend, as it seems to me, on the meaning of the word "procedure." The question there was whether, by the Charter of 1865, the right of appeal to the High Court, which was given by the previous Charter of 1862,

taken away; and (whether that was or was not properly called an alteration in the procedure), the Court held, and I think very properly, that the right of appeal to the High Court was taken away by the Charter of 1865. At the time when that case was decided, Act I of 1868, the General Clauses Act, had not been passed; and therefore the effect which section 6 of that Act might have upon proceedings in any pending suit was not considered.

1878  
HUNGIT  
SINGH  
v.  
MEHARBAN  
KORR.  
Judgment.  
GARTH, C.J.

The only other provision in the new Code, to which I think it necessary to refer, is section 591, which enacts that, "except as provided in Chapter XLIII, no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction." But this provision appears to be clearly prospective. The appeals allowed by Chapter XLIII are only appeals from orders made *under the new Code*; and the whole of the chapter, as it seems to me, is intended to apply only to *future* orders to be made under the new Code. I am, therefore, of opinion that this appeal should be admitted.

This decision will govern the other cases numbered 2, 26, 27, and 48 of 1878, which are also referred to us, and which depend upon the same principle. In all the above cases, therefore, consider that the appeals should be admitted.

In No. 323 of 1877 no appeal would have been allowed under the old Code; and, as the new Code does not confer any right of appeal in such a case, the appeal must be dismissed with costs.

JACKSON, J. :—

JACKSON, J.

The difficulty in these cases generally has arisen from the repeal of the Act under which they would have been cognizable, without the simultaneous enactment of any provision saving the right of appeal; and it has been proposed to get over the difficulty by putting some force on the word "decree" as defined in the new Code. A good deal of discussion has also arisen upon the meaning of the last clause of section 3.

The appeal given by section 588 of the present Code applies to orders made under the Code and to no others, and the finality given by the same section to appellate decisions of that nature is confined to orders passed in appeals under that section.

1878  
 RUKMIT  
 SINGH  
 v.  
 MEHARBAN  
 KOHR.  
 Judgment.  
 JACKSON, J.

The word "decree" cannot, in my opinion, include either original or appellate, upon matters arising in the course of a suit or in execution of the decree.

The decision of the appellate Court, on an appeal from the original decree, is in truth the result of the decision of the original Court, and therefore comes at once within the definition of a "decree."

The judicial proceedings referred to in the same definition I think, those provided for in section 647, and are altogether outside regular suits.

To adopt any other interpretation, and to hold that judicial proceedings in the definition clause include proceedings in suits before or after decree, would be, in my opinion, to introduce needless and extreme confusion into the provisions of the Code.

The difficulty created by section 3 arises mainly from the ambiguous word "procedure,"—which evidently has two senses—sometimes in one and sometimes in the other sense. In one of the two, it includes all the remedies or modes of relief which a suitor is entitled, and in the other it denotes the steps which are to be taken by the Court or its officers in maintaining the rights of litigants, in putting them into possession of that which is found to be their due, in conducting its own business or enforcing its own decisions. The embarrassment which has arisen entirely disappears if we limit the word "procedure" to that meaning which, I apprehend, it was intended to bear. It generally does bear in most places where it occurs in the Code, viz., the rules of practice whereby "rights are effectuated" and the successful application of the proper remedies." I think that the Code is chiefly meant to contain as complete a set of rules as possible of those rules, and that, although we find in the Code and there declarations as to those cases in which appeal shall not lie, this is done for the sake of convenience because those provisions form a part of procedure as called. Those declarations govern the cases to which they are expressly applicable, and as to other cases they will be governed either on the words of actual preservative enactments, or on general principles applicable to the retrospective force of the law. If this be so, it follows that the last clause of

taken by itself has really no effect upon this question, but relates only to the application of the rules of practice contained in the Code. We cannot, I think, nor is it necessary that we should, rely for the purposes of this case on clause 16 of the Letters Patent of 1865. In the first place, it seems to me that the 16th clause only gave jurisdiction in the sense of enabling the High Court to try the appeals lawfully coming before it, which is, in my opinion, a very different thing from an enactment conferring on the subject a right of appeal. But, in the second place, by the 44th clause, which only gives effect to clause 9 of the Statute 24 and 25 Vict., the Letters Patent are expressly made subject in all particulars to the legislative powers of the Governor-General in Council, and subsequently the Indian Legislature has, by Act VI of 1871, declared, in section 21, that "appeals from the decrees and orders of District Judges and Additional Judges shall, when such appeals are allowed by law, lie to the High Court;" and, by section 22, that "appeals from the decrees and orders of Subordinate Judges and Munsiffs shall, when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceed Rs. 5,000, in which case the appeal shall lie to the High Court." That the limiting words, "when such appeals are allowed by law," extend to the latter part of the sentence I cannot doubt, either on grounds of grammatical construction, or with reference to the reason of the thing; and thus by the enactment of a competent Legislature the power of hearing appeals given to the High Court is expressly restricted to those cases in which appeal is allowed by any law in force. But even without an express enactment the result in my opinion would have been the same. I have already observed on what seems to me the distinction between enabling a Court to hear appeals and conferring on parties the right of appeal. But with reference to the second reason for thinking the clause inoperative, it has been pointed out that the Court is there directed to exercise "appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force;" and it is suggested that these latter words validly confer an appellate jurisdiction in such cases till the jurisdiction is expressly

1878  
 BUNGETT  
 SINGH  
 v.  
 MEHARRAN  
 KORB.  
 Judgment.  
 JACKSON, J.



1878  
 RUNGIT  
 SINGH  
 v.  
 MEHARBAN  
 KOER.  
 Judgment.

JACKSON, J.

taken away. I attach no weight to the word "*now*" seems to me purely descriptive, having reference to the j tion to be exercised at the moment when the new Letters were published. I presume that if any Act allowing ap the High Court had been repealed on the 1st January 18 Court could not have heard such appeals if presented a publication of the Letters Patent, although the case be subject to appeal by a law in force on the 28th of Dec 1865, the date which the Letters Patent bear. My o therefore, is that the power of this Court to hear appe the Civil Courts in the interior (inseparable from the d parties to prefer the appeals) is now regulated by Act 1871.

In my opinion, however, we may safely adopt, and for of obviating hardship and injustice we ought to adopt, struction which the High Court of Bombay has put on 6, Act I. of 1868, in *Ruttun Chand vs. Himmat* Bombay, 168, Appeals from Civil Jurisdiction), and also to hold that it will cover specific proceedings tak cution of a decree which have been commenced before it came into force; that is, before the repeal of Act VII became operative. By making this use of the 6th of the General Clauses Act, and by taking the view wh taken of the effect of section 3, it seems to me that all is avoided. The provisions of the Code will then ha trospective effect so as to injure any right of action of appeal existing at the time when the Code came into the same time that the procedure, as intended by the Code and as employed in this very Code, will come into force incidents in every case at the time indicated, that is the procedure in suits instituted after the Code came will be wholly subject to its provisions; (2) the procedu commenced before it came into force and pending at tha be regulated by the previous law up to decree and by after decree; and (3) the procedure after decree in st mined before the Code came into force would thereafte rned entirely by the Code as to new proceedings, but proceedings already commenced, which, according to the

suggested, are specially protected by Act I of 1868. With these indications of my own reasons, I concur in the proposed decision in the several appeals before us.

1878  
RUKMIT  
SINGH  
v.  
MEHARBAN  
KORR.  
Judgment.

MARBY, J. (MITTER, J., concurring) :—

URENDRO NATH PAL CHOWDHRY vs. CHUNDER MARBY, J.  
COOMAR ROY—No. 323 of 1877.

This was an application under section 208 of Act VIII of 1859 for the purchaser of a decree to be allowed to execute the decree. The application was rejected by the District Judge on the 17th of August 1877. The appeal to this Court was presented on the 14th of November 1877, that is, after the new Code came into force. No appeal will lie against this order under section 588, which only applies to orders made under the new Code which this order plainly was not. If, therefore, the appeal lies under the new Code at all, it must lie as an appeal from an original decree under section 540, which applies to decrees made under the old Code as well as to decrees made under the new. The question therefore is, whether the order of the lower Court was a "decree" within the meaning of section 540.

By section 2, "a decree means the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied." By "the result of the decision of the suit" we understand to be meant the order of the Court granting or refusing that or some part of that which the suit was brought to obtain. By "other judicial proceeding," we understand to be meant not the result of a judicial proceeding of any other kind whatsoever, but of a judicial proceeding which does not arise out of a suit such, for example, as proceedings other than suits in which by section 647 the Procedure Code is made, as far as it is applicable. No doubt the words "any other judicial proceeding" are capable of receiving a wider construction. Almost every order of a Court of Justice embodies the result of a judicial proceeding; and an order made on appeal always does so. Moreover in ordinary language an order made on appeal is called a decree. But in the definition itself, we have an indication that this was not the intention, in the fact that "an order on

1878

SURENDRO  
NATH PAL  
CHOWDERY  
v.  
CHUNDER  
COOMAR ROY.

*Judgment.*

MARKBY, J.

appeal, remanding a suit for retrial," is declared to be not the definition. This we take to be an example or illustration of an exception. If the wider construction of the words "any judicial proceeding" were intended by the Legislature, a rule would have come within the definition, because it cannot be denied that an order of that nature, though it does not produce the results of the decision of the *suit*, clearly embodies the substance of the decision of the *appeal*. It declares that the result of the *appeal* is that the suit must be remanded for retrial. As is evident from a comparison of chapters 41 and 42 with chapter 43, that the Legislature intended in the last-mentioned chapter to provide for appeals against "orders" which are not "decrees." But many of these "orders" would be "decrees" if we were to adopt the wider construction of the words "any other judicial proceedings" as mentioned above. For example, under the wider construction an execution proceeding, or a proceeding under section 258 to compel a decree-holder to certify, or a proceeding under sections 311 and 312 to set aside a sale, or in an interim matter under sections 351, 352, 353, or 357, or a proceeding under chapters 34 and 35 would be included within the words "any other judicial proceeding;" and orders referred to in clauses (k), (m), (n), and (r) of section 588 would be "decrees" within the definition of that word as given in section 2 of the Code. But a comparison of the chapters mentioned above clearly shows that that was not the intention of the Legislature. Furthermore, if we were to adopt the wider construction of the words "other judicial proceeding" in section 2 we should have to give the same construction to the words "proceedings other than appeals" in section 647 of the Code. In this view of section 647, the provisions of sections 649 and 650 would be unnecessary, for the matter dealt with by the last two sections would have then been already provided for by section 647. These are some of the considerations which lead us to adopt the narrower construction of the words "any other judicial proceeding" which we have adopted.

The appeal in this case, therefore, does not lie either under section 540 or section 588 of Act X of 1877, and there is no provision in any other Act, of which we are aware, under

can be brought. There is no provision of Act VIII of 1859, of Act XXIII of 1861, applicable to such a case. Section 11 of Act XXIII of 1861 comes nearest to it, but it has been frequently held that this section does not apply to a proceeding under section 208 of Act VIII of 1859. Nor can the appeal be made under section 16 of the Letters Patent of 1865. That section empowers this Court to hear appeals in such cases as were subject to appeal to the High Court by virtue of any laws or regulations then in force. But this only throws us back again to the old law, which, as we have said, does not provide for an appeal in such cases as this. In our opinion, therefore, no appeal lies in this case.

1878  
SURENDRO  
NATH PAL  
CHOWDHRY  
v.  
CHUNDAR  
COOMAR ROY.  
Judgment.  
MARKBY, J.

**UNJIT SINGH vs. MEHARBAN KOOER—No. 360 of 1877.**

This was an application to execute a decree for possession of land and costs. The Moonsiff, on the 17th March 1877, held that execution was barred by limitation, and rejected the application. The District Judge, on the 23rd August 1877, held that execution was not barred, and ordered execution to issue. On the 19th November 1877, the judgment-debtor presented an appeal to this Court.

For reasons already stated, no appeal can lie against the order of the lower appellate Court, either under section 588 of the Code or under section 584. There was, however, a right of appeal to this Court against the order of the lower appellate Court at the time when that order was made under Act XXIII of 1861, section 11, which had not then been repealed, and although this Act was repealed when this appeal was presented, although there is no provision in the new Code under which an appeal can lie in this case, there is still nothing in the new Code which expressly prohibits such an appeal. The prohibitory words in the first and last clauses of section 588 do not apply to the order of the lower appellate Court in this case, inasmuch as that order was made before the new Code came into force: and those prohibitions are not retrospective.

If the appeal in this case is taken away at all, it is taken away by the repeal of Act XXIII of 1861, which formerly gave an appeal in this case. But we think that, notwithstanding the

1878  
 RUNJIT  
 SINGH  
 v.  
 MEHARBAN  
 KOOR.

*Judgment.*

MARKBY, J.



repeal of Act XXIII of 1861, this Court is empowered to and ought to hear, this appeal under the provisions of s. 16 of the Letters Patent of 1865. That section provides this Court "shall be a Court of Appeal from the Civil Court of the Bengal Division of the Presidency of Fort William for all other Courts subject to its superintendence, and exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force." We think this clause is in itself a sufficient authority to this Court to hear this appeal. It is not pretended that the Legislature intended to take away a right of appeal which existed, though it had not been exercised when Act XXIII of 1861 was passed. Had they intended this they would, we think, have used express words for the purpose. No doubt the Legislature has power under section 9 of the 24 and 25 Act of 1869, to take away from this Court the powers conferred by section 16 of the Letters Patent; and by section 588 of the Code it has taken away a large portion of those powers, but in our opinion, not in this instance. It is said that section 16 of the Letters Patent only gives the power to hear appeals, and that, therefore, the appeal no longer lies. With deference it seems to us that so long as the power to hear an appeal remains, that is sufficient, and that the power of a Court to hear an appeal carries with it, as a necessary consequence, the right to an appellant to present to that Court a petition for an appeal. If, as very often happens, the power to hear an appeal and the right of appeal is given by one and the same provision, then the repeal of that provision would destroy the appeal together; but here there are two wholly independent provisions, one of which is untouched, and which is alone sufficient to enable us to hear this appeal. We think, therefore, that this appeal should be heard.

RAJ COOMAREE DABEE CHOWDRAIN vs. MISS  
 MUNDUL—No. 2 of 1878.

This was an application to execute a decree, by which it was ordered that the judgment-debtor should execute a lease.

ment-debtor objected that she ought not to be made to  
ate the lease, and that execution of the decree was barred by  
ation. The Subordinate Judge, on the 15th September 1877,  
ruled these objections and ordered the lease to be executed.  
appeal to this Court was presented on the 2nd January  
1878.

1878  
RAJ COOMAR  
BEE DABER  
CHOWDHURAN  
MISSURAM  
MUNDUL.

*Judgment.*

MARKBY, J.

reasons already stated in Miscellaneous Regular Appeal  
23 of 1877, no appeal lies to this Court against that order  
Act X of 1877. But as the law stood when the order of  
lower appellate Court was made, an appeal against it lay to  
this Court under Act XXIII of 1861, section 11. In our  
this Court is still empowered to hear this appeal under  
16 of the Letters Patent of 1865. We have given our  
for this conclusion in case No. 360 of 1877. That  
is applicable to this case: and we think this appeal  
to be heard.

AN CHUNDER CHUCKERBUTTY vs. RAKHAL  
CHUNDER ROY—No. 26 of 1878.

In this case the decree-holder had obtained a decree for rent:  
decree-holder desired to attach the moveable property of the  
judgment-debtor. The judgment-debtor insisted that the decree-  
holder was bound first to execute the decree against the tenure.  
Munsiff thought the decree-holder was bound to take that  
and on 17th March 1877, refused to execute the decree  
against the moveable property of the judgment-debtor. The  
decree-holder, on the 6th of April 1877, appealed to the District  
Court, who, on the 5th October 1877, set aside the Munsiff's  
order and ordered execution against the moveable property to  
be made. On the 4th January 1878, the judgment-debtor presented  
an appeal to this Court.

reasons already stated in Miscellaneous Regular Appeal  
23 of 1877, no appeal can lie to this Court in this case  
under Act X of 1877.

However, remains to consider whether, although no appeal  
lies against the order of the lower appellate Court under the  
Code, the right of appeal, which undoubtedly existed before  
the Code came into operation, has been thereby taken away.

1878  
 HARAN  
 CHUNDER  
 CHUCKER-  
 BUTTY  
 v.  
 RAKHAL  
 CHUNDER  
 ROY.

—  
*Judgment.*

MARKET, J.

The appeal was given by Act XXIII of 1861, section 1 there are only two modes by which the appeal so given can be taken away—(1) by the repeal of that Act; (2) prohibitory words of the first and last clauses of section 1 of Act XXIII of 1861 is repealed by the new Code, section 1 the proviso that "nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal preferred before this Code comes into force." Act I of 1868, section 1 also provides "the repeal of any Statute, Act or Regulation shall not affect anything done or any offence committed, or any penalty incurred, or any proceedings commenced before the Repealing Act shall have come into operation." The repeal of Act XXIII of 1861 is subject to these two provisos.

The proceeding before the lower appellate Court, that is, the appeal of the decree-holder from the decision of the District Court, was commenced by the petition of appeal, dated the 2nd of October 1877. It was therefore commenced before the Repealing Act came into operation. It appears to us, therefore, that in consequence of the second of the above provisos, the repeal of Act XXIII of 1861 does not "affect" that proceeding. Therefore, so, there was, at any rate, so far no difficulty in the lower appellate Court making its order of October 5th 1877, under the old Code; for though that Code was then repealed, for the purposes of the appeal then pending for decision before the lower appellate Court, the old Code still remained in force.

The question, however, still remains whether the order of the lower appellate Court ought to be considered as, in fact, made under Act XXIII of 1861, or under the new Code. This is to be determined in order to see whether or no the case falls within the prohibitions contained in the first and last clauses of section 588. On the whole there is, we think, nothing in Act XXIII which compels us to say that the order of the lower appellate Court was made under the new Code: and as, for the purpose of the appeal in the lower appellate Court, Act XXIII of 1861 was in force, we think that the order of the lower appellate Court ought to be considered as, in fact, made under the old Code and not under the new Code. The prohibitory words thereof in section 588 do not apply to this case. If these prohibitory

It apply, then, as already shown in Miscellaneous Special Appeal No. 360 of 1877, this Court is empowered to hear this appeal under section 16 of the Letters Patent of 1865, and we think, therefore, that this appeal ought to be heard.

1878  
Judgment.  
MARKEBY, J.

The remaining four cases all stand upon the same grounds, as they appear from the following statement of facts:—

**AMIR ALI KHAN vs. MAHOMED SABAIR—No. 27 of 1878.**

In this case certain persons presented a petition to a Moonsiff under section 119 of Act VIII of 1859, alleging that there had been an *ex-parte* decree against them, and praying that this decree should be set aside and the suit heard. The Moonsiff, on 19th June 1877, rejected the application. The petitioners appealed, and the Officiating District Judge, on the 27th September 1877, rejected the appeal. The petitioners then, on the 4th January 1878, presented a second appeal to this Court. An appeal against the order of the lower appellate Court lay to this Court under sections 119 and 372 of the former Code of Procedure.

**HUNDKAR MAHOMED TOWSICAL ISLAM vs. AMEER-UNISSA BEEBEE—No. 80 of 1878.**

In this case a decree-holder applied for execution of a decree against the judgment-debtor. The judgment-debtor then put in an application under section 119, praying that the judgment should be set aside and the case heard. On this he was summoned by the Officiating District Judge to appear personally. He did not attend, and having given no evidence in support of his application, it was dismissed on the 15th March 1876. The judgment-debtor on the 1st April 1876 appealed, and on the 3rd October 1877, the Officiating District Judge dismissed the appeal. On the 31st January 1878, the judgment-debtor presented a second appeal to this Court. This appeal would lie under the provisions of sections 119 and 372 of Act VIII of 1859.

**HARAM ROY vs. SRIMONTO CHUCKERBUTTY—No. 33 of 1878.**

The decree-holder in this case had obtained a decree for possession, mesne profits, and costs. He applied for execution, and



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 BUTTY.  
 ———  
*Judgment.*  
 ———  
 MARKBY, J.

the Subordinate Judge, on the 5th August 1876, ordered that he should recover mesne profits from Srabun 1269 to the end of 1280, and certain costs which were specified. The judgment-debtor, on the 10th August 1877, appealed to the District Judge, complaining against the order of the Subordinate Judge both as to mesne profits and costs. The District Judge, on the 30th November 1877, dismissed the appeal. On the 31st January 1878, the judgment-debtor appealed to this Court. This appeal would lie under the provisions of section 11 of Act XXIII of 1861.

**SREENATH BANERJEE vs. TROILOKHONATH BISWAS—**  
**No. 48 of 1878.**

In this case the decree-holder had obtained a rent-decree for money on the 16th September 1871. On the 18th July 1876 he applied for execution. The Subordinate Judge, on the 14th December 1876, held that execution was barred by section 58 of Act VIII of 1869, B. C. On the 13th January 1877, the execution-creditor appealed to the District Judge, who, on the 15th December 1877, reversed the order of the Subordinate Judge and ordered execution to issue. The judgment-debtor, on the 25th February 1878, presented a petition of appeal to this Court. This appeal would lie under section 11 of Act XXIII of 1861.

The question in all these last four cases is precisely the same, namely, whether the provisions under which these appeals were formerly given being repealed, the appeals will lie now, the repeal of those provisions notwithstanding?

For the reasons stated in Miscellaneous Special Appeal No. 30 of 1877, and Miscellaneous Special Appeal No. 26 of 1878, we think this Court is still empowered to hear these appeals, and therefore these appeals ought to be heard.

In dealing with these appeals we have not given to section 6 of Act I of 1868 so wide an application as the Chief Justice and one other of the learned Judges are disposed to do. It seems to us that difficulties may arise if we give that section too wide a operation. We prefer, therefore, to admit these appeals on another ground upon which they seem to us admissible, reserving for the present, the consideration of the exact limits of application of section 6 of Act I of 1868 to the new Code of Procedure.

AINSLIE, J. :—

I concur with my learned brothers MARKBY and MITTER in thinking that in all cases in which an appeal lay under Act VIII of 1859, the right of appeal is saved by the 16th section of the Letters Patent. This disposes of all the appeals before us, excepting No. 323. The order in this case was made under section 588, Act VIII, 1859, and was not open to appeal. The matter dealt with by the order is now governed by section 232 of the present Code. Reading section 588, clause (j,) with clause (p,) an order made under section 232, if in favour of the assignee of a decree, is appealable as an order; but section 588 only applies to orders made under the Code, and section 591 bars any appeal from an order not provided for by section 588. I therefore concur in rejecting appeal No. 323, and in admitting all the others before us.

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RANJIT  
SINGH  
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KOOER.

Judgment.

AINSLIE, J.

## [CIVIL APPELLATE JURISDICTION.]

1878.  
April 24.

ASMAN SINGH AND OTHERS . . . . . DEFENDANTS;

AND

MUSSUMAT AJNAS KOER . . . . . PLAINTIFF.

*Suit for contribution—Joint Decree—Primary liability of Plaintiff—Non-liability to contribute.*

Where a joint decree, passed against several defendants has been satisfied out of the property of one of them, then, in a subsequent suit for contribution brought by the latter against her co-defendants in the former suit, there is nothing to prevent the defendants from pleading that as between themselves and the plaintiff the latter alone was liable to satisfy the decree in the former suit, and that, consequently, they are not liable to contribute.

**SPECIAL APPEAL** from a decree passed by the Judge of the District of Bhagulpore, affirming that of the Subordinate Judge of the District.

The facts are these:—One Abdul Khalik sued the plaintiff and defendants in the present suit and obtained a joint decree which was executed solely against the property of the plaintiff, who then sued the defendants for contribution. The defendants pleaded that, as between themselves and the plaintiff, she alone was liable to satisfy the decree obtained by Abdul Khalik. The suit was decreed by the Subordinate Judge, and this decree was affirmed on appeal. In reference to the defendants' plea, the Judge said: "The mere question at issue appears to be a simple one, namely, can this Court look behind the joint decree passed against plaintiff and defendants? When that decree was passed, the liability or non-liability of the defendants was determined, and rightly or wrongly the finding was that the defendants were liable. That judgment having become final, the question of liability cannot be again raised." The defendants then brought this special appeal.

Tr. *M. L. Sandel*, for Appellant.

*Laboo Jogesh Chunder Dey*, for Respondent.

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AJNAS KORE.

*Judgment.*

The judgment of the High Court (1) is as follows:—

The point raised in this special appeal is that the lower appellate court has committed an error in deciding that in this suit the court was not competent to look behind the joint decree passed against the plaintiff and the defendants. The Judge observes: "Then that decree was passed, the liability or non-liability of defendants was tried, and rightly or wrongly the finding that the defendants were liable. That judgment having become final, the question of the non-liability cannot be again raised." Now the fallacy of that reasoning appears to be this, the Judge omits to observe that the question of liability or non-liability was tried as between all the defendants together and the plaintiff in that suit, and in regard to him they were all to be liable.

That would by no means debar one of the persons so affected from showing, in a suit brought for contribution, that, in point of fact, as amongst themselves, he was not liable under the decree. In this manner it seems to follow that if the plaintiff in the first instance had proceeded against the present defendant and recovered the whole amount from him, he might have brought a suit against the present plaintiff and recovered the entire amount from him. The judgment of the lower appellate Court must be set aside, and the case must go back, in order that the Judge may enquire into the equitable considerations raised by the defendants. The costs of the appeal will follow the result.

(1) *JACKSON and TOTTENHAM, J.J.*

## [CRIMINAL REVISIONAL JURISDICTION.]

1878  
June 24.  
—

IN THE MATTER OF NOOR-OOOL HUK AND ANOTHER.

*Section 502, Code of Criminal Procedure—Forfeiture of Recognizance—Excessive Amount—High Court as Court of Revision—Power of Government.*

The High Court, as a Court of Revision, has no power to reduce the amount of a recognizance that may have been forfeited. The Magistrate of the District should, in such a case, address Government.  
*Nilmadhuh Ghosal*, 19 W. R., 1, cited and followed.

CASE referred by the District Magistrate of Jessore to the High Court, as a Court of Revision, that the order of the Assistant Magistrate of Khoolna forfeiting the recognizance of two persons to keep the peace might be modified, the same being excessive and beyond their means to pay.

The following judgment was delivered by the High Court (1).

In the case of *Nilmadhuh Ghosal*, reported at p. 1, Criminal Rulings, XIX W. R., a Bench of this Court held that we have no power to reduce the amount of recognizances which have been forfeited. The Bombay High Court has expressed the same opinion.

The papers must be returned. The Officiating Magistrate should refer the matter to Government if he thinks the amount of the recognizance was excessive.

(1) AINSLIE and BROUGHTON, J.J.

## [ORIGINAL CIVIL JURISDICTION.]

OTHOORA MOHUN ROY . . . . . PLAINTIFF;

AND

MARY MOHUN SHAW AND OTHERS . . . . . DEFENDANTS.

1878  
April 2.

*Bill of Exchange—Promissory Notes—Stamp Act of 1869, sections 5, 8, 19, 20, 26, 28—Evidence—Inadmissibility—Evidence of Original Consideration—Consideration for which note was made.*

Where a bill of exchange for the sum of Rs. 1,000, drawn, accepted, and endorsed, is insufficiently stamped, it is not receivable in evidence in a suit on the note, even on payment of a penalty.

Where such a suit is brought by the endorsee against his immediate endorser, the Court may not, if the application be not made in proper time, allow the plaint to be amended so as to recover on a count for money paid to the defendants, even though the plaintiff may be allowed to bring a fresh suit.

Sections 5, 8, 19, 20, 26, 28, of the General Stamp Act XVIII of 1869, discussed.

*Golab Chand Murwari vs. Mahkam Kumbhari*, Sp. App. No. 2839 of 1876, not followed.

THIS was a suit for Rs. 8,500, the amount of several hoondees, interest. The material paragraphs of the plaint are as follows:—

The plaintiff further states that one Nundkissore Bajpie, on the 6th of the light side of Kartik in the Sumbut year 1932, corresponding to the 4th day of November 1875, by a hoondee now overdue directed to Jowara Prosaud, required the said Misser Jowara Prosaud to pay to respectable holder thereof Rs. 1,000, forty-eight days after date of the hoondee, the holder thereof being then Gour Chunder Gourmohun Ram Paul, who endorsed the same to the defendant Dwarkamohun and the said defendant Dwarkamohun Shaw blank endorsed the said hoondee to the defendant's firm of Gour Chunder Buddynath Shaw, and the said firm blank endorsed the same at Calcutta to the plaintiffs, and the hoondee was duly presented for payment and was dishonored, whereof the defendants had due notice but did not pay the same.

The plaintiff further states that one Bajpie Bhowanee Persaud, on the 1st day of the light side of the moon in Assin in the Sumbut year corresponding with the 30th day of September 1875, by a hoondee

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Statement.

now overdue directed to Purmanund Sookool, required the said P Sookool to pay to the respectable holder thereof Rs. 1,000 nu after date of the said hoondée, the holder thereof being then Gour Gourmohun Juggeram Paul, who endorsed the same to the Dwarkamohun Shaw, and the said Dwarkamohun Shaw blank the said hoondée to the defendants' firm of Gour Chunder B Shaw, and the said firm blank endorsed the same at Calcutta to tiff, and the said hoondée was duly presented for payment and wored, whereof the defendant had due notice.

7. The plaintiff also states that one Mohun Lall Beerah, on t of the light side of the moon in Assin in the Sumbut year 199 ponding with the 30th day of September 1875, by a hoondée n directed to Bhuggoban Doss Beerah at Calcutta, required the said ban Doss Beerah to pay to the respectable holder thereof Rs. 1,0 days after date of the said hoondée, the holder thereof b Chunder Gour Mohun Juggeram Paul, who endorsed the s defendant Dwarkamohun Shaw, and the said Dwarkamohun S endorsed the said hoondée to the defendants' firm of Gour Chunnath Shaw, and the said firm blank endorsed the same to t and the said hoondée was duly presented for payment and was whereof the defendants had due notice.

The defendants were merchants residing at Dacca, business there and in Calcutta, under the name and Gour Chunder Buddynath Shaw. Dwarkamohun S defendant above-named, was the managing partner of in Calcutta. The defendants denied all knowledge of the above-mentioned, and alleged that their signatures w The case came on for hearing on the 28th of Febru before Mr. Justice PONTIFEX.

*J. D. Bell, Evans, Phillips, and Bonnerjee, for the P  
 Branson, Jackson, and Hill, for the Defendants.*

[During the examination of the plaintiff's first wit Bonnerjee tendered in evidence the hoondée for Rs. referred to in the 7th paragraph of the plaint, which w to the amount of 10 annas. Mr. Jackson objected to sion on the ground that the stamp ought to be 12 an one of the stamps being a one anna receipt stamp, p document bore only a 9 annas stamp, and section 28 of Act XVIII of 1869, prevented its being stamped after Bonnerjee tendered the hoondées referred to in the 4th

paragraphs of the plaint, which were objected to by Mr. Jackson on the same grounds. The question of their admission was then argued.]

*J. D. Bell.*—Reading together sections 26 and 28 of the Stamp Act, it is clear that they only refer to instruments chargeable with a one-anna stamp.

[*PONTIFEX, J.*—What do you say about section 20? That does not refer to instruments chargeable with a one-anna stamp merely. It says that the penalty shall not exceed Rs. 1,000. Now fifty times one anna is not Rs. 1,000.]

*J. D. Bell.*—I am bound to say, my Lord, that there is a decision of the Madras High Court against me—*Chinna Perumal Saker vs. Annammal*, 7 Mad., 361, but the case was not argued. Section 26 refers only to instruments chargeable with one anna.

*PONTIFEX, J.*—Section 8 does not refer to inland Bills. Besides these bills are not admissible upon another ground. If you contend, section 28 applies only to instruments chargeable with one anna, section 5 shows that you cannot use an adhesive stamp at all. Again, section 19 shows that section 20 does not apply to Bills of Exchange: it could never have been intended that section 20 should alter section 19. I must dismiss the objection as to the bills mentioned in the 7th, 5th, and 4th paragraphs of the plaint, on the ground that they are independently stamped.]

*J. D. Bell.*—Then I would ask your Lordship to allow the plaint to be amended by adding a count for money paid to the defendants' request. The plaintiff may recover irrespective of the contract alleged in the plaint if the issue admit of the true contract being decided—*Arbuthnot vs. Belts*, 6 B. L. R., 273; *Anarain Mozoomdar vs. Muddomutty Gooptu*, 14 B. L. R., 100. The plaint may be amended so as to recover on the consideration of the note—*Joseph vs. Solano*, 9 B. L. R., 100, and that amendment may take place at any time before final judgment—*Ramdayal Khan vs. Ajoodhya Ram Khan*, I. L. R., 2 Cal., 1; *East Indian Railway Co. vs. Jordan*, 4 B. L. R., O. C., 100. The Court can amend the issues, and I ask that an issue be framed as to whether we are entitled to recover the money we claim from the defendants.

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FEARY  
MOHUN  
SHAW.

Argument.



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 SHAW.  
 Argument.

[PONTIFEX, J.—Mr. Jackson, supposing the hoondees are genuine, surely I might raise such an issue.]

Jackson.—The Court would scarcely raise such an issue in a case under the Stamp Act, because that would be getting rid of the Act altogether. Moreover, this point has been decided by the case of *Ankur Ghunder Roy Chowdhry vs. Madhub Chunder Ghose*, 21 W. R., 1. The circumstance that in that case the defendants were drawers and not endorsers does not affect the principle on which the case was decided. *Joseph vs. Solano* is a very different case from the present. There the illegality only went to a portion of the transaction, and being a suit under Act V. of 1866, the plaintiff could not have been framed differently. In *Arbuthnot vs. Bell* the issues raised admitted of the question being tried.

*Bell*, in reply, cited 5 Taunton, 480.

Branson called his Lordship's attention to the case of *Golab Chand Murwari vs. Mahkum Kunwari*, an unreported case decided by JACKSON and KENNEDY, J.J., on the 4th of January 1878, in which the case of *Ankur Roy Chowdhry vs. Madhub Chunder Ghose*, 21 W. R., 1, was dissented from.

PONTIFEX, J. PONTIFEX, J. :—

The plaint in this case was filed on the 9th of March 1878 and the defendant's written statement on the 25th of April 1878. The plaintiffs, therefore, have had ample time to amend, and I do not think that, under the circumstances, I can allow the amendment at this stage of the case. I will reserve the question whether I will give leave to bring a fresh suit. [On the motion the plaintiff's suit was dismissed, but without costs; and leave was given to bring an action for the amount of the consideration paid for the rejected hundees.]

(1) GOLAB CHAND MURWARI vs. MAHKUM KUNWARI, ANOTHER.—UNSTAMPED PROMISSORY NOTE—EVIDENCE.—*The payee of an unstamped promissory note endorsed it over to the plaintiff, who subsequently brought a suit on the note against the maker, making the payee a proper defendant. The unstamped promissory note having been rejected as inadmissible it was held that the plaintiff was entitled, without any amendment, to recover from the maker the actual amount of the original consideration for which the*

note was made, and that he should be allowed to give independent evidence of that at the hearing.

This was a suit on a promissory note for Rs. 1,500 and interest, dated the 14th of April 1873, and payable one year after date. The plaintiff alleged that the defendant Mabhkum Kunwari executed the note in favour of the *pro-forma* defendant Mita Ram Sahu, who sold the note to the plaintiff. The note was unstamped. Plaintiff summoned Mita Ram Sahu to produce the books of account in order to show the existence of the debt for which the note was given. The Court refused to receive the evidence and dismissed the case. Plaintiff appealed, but his appeal was dismissed. He then brought this special appeal.

KENNEDY, J. (JACKSON, J., concurring).—The general principle seems well settled that the existence of an unstamped promissory note does not prevent the lender of money from recovering on the original consideration, if the pleadings are properly framed for that purpose—*Farr vs. Price*, 1 East, 57. In this country the great power given of raising the true issues between the parties prevents the question of pleading having much importance. Our only difficulty arose from the decision of Sir R. COUCH in 21 W. R., 1—*Ankar Chunder Roy Chowdry vs. Madhub Chunder Ghose*. When, however, that is examined, it does not support the proposition for which it was cited by the respondent's pleader. It is not very satisfactory, there being no note of the argument or statement of the facts; but so far as we can gather, there had been no attempt in the lower Court to give independent evidence of the consideration, the contention for the plaintiff being that there was a tacit admission of the note in the written statement; and I think it highly improbable that, considering the Judges who decided the case, they intended, without any allusion to *Farr vs. Price*, to over-rule Lord Brougham's decision in that case, which precisely governs the present appeal, in which it appears that the plaintiff did seek to give evidence of the advance, the form of pleading being, as I said, not material.

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Note.

## [CIVIL APPELLATE JURISDICTION.]

1878  
June 3.

BHOIRUB CHUNDER DOSS AND ANOTHER . . PLAINTIFF  
AND  
HAFEZUNISSA KHATOON AND OTHERS . . . DEFENDANT

*Involuntary payment—Suit for contribution—Set off—Regulation V  
1819, section 13—Act VIII (B.C.) of 1869, section 62.*

A and B were the proprietors of a jote, of which B leased half share to C as mirasidar. The zemindar brought a suit for rent jote against A and B and got a joint decree, in execution of which he put up the jote for sale. C, in order to save his *miras* right, paid the amount of the decrees before sale, and then sued A and B for the amount so paid: *Held*, that C was entitled to recover, and set off his claim for rent by B against C, but which C disputed, and which was admitted as an answer to C's claim in the present suit or as a set-off.

It is essential to the validity of a set-off that the debts be mutual, due from and to the same parties and in the same right. See Regulation VIII of 1819, section 13, and Act VIII (B.C.) of 1869, section 62, discussed.

**SPECIAL APPEAL** from a decree passed by the District Judge of Furridpur, reversing that of the Moonsiff of the same place.

Baboo Grija Sunker Mozoomdar, for Appellant.  
Baboo Srinath Doss, for Respondent.

The facts of the case are fully set out in the judgment of the District Court (1) which was delivered by

GARTH, C.J. GARTH, C.J. :—

This case now comes before us in special appeal, after having been remanded by the District Judge and the judgment of the lower court which followed that remand. We have found it necessary in order to the proper solution of the questions which we have to determine, to send for the earlier judgments in the case.

(1) GARTH, C.J., and McDONNELL, J.

having now ascertained the facts, we think that the District Judge was not justified in remanding the case at all.

The plaintiffs held, out of the eight annas share of the defendant No. 5, four annas in the two tenures mentioned in the plaint, under a mirasi title subordinate to the recorded jotedars, the defendants Nos. 4 and 5. These tenures were originally held in equal shares by Denomoni the defendant No. 4, and Kali Chunder defendant No. 5. Kali Chunder sold his share to the defendants Nos. 1, 2 and 3, but those defendants did not register their names in the zemindar's sherishta. The rents of the tenures having fallen into arrear, the zemindar obtained decrees against the registered tenants, the defendants Nos. 4 and 5, and under those decrees the jotes were put up for sale. In this state of things, the sale having actually commenced, the plaintiffs, in order to save their own mirasi rights, paid the amount of the decrees into the Court, and then brought this suit to recover from the defendants the amount so paid, with interest and costs.

The defendants contended that the payment by the plaintiffs was a voluntary act on their part; but the Moonsiff found that they were compelled to pay the money, in order to save their tenure; so he gave a decree in their favour for the debt, interest and costs, and he directed one-half of that sum to be paid by the defendants Nos. 1, 2 and 3, and the other half by defendant No. 4.

Another defence set up by the defendants Nos. 1, 2 and 3 was this,—that whilst the defendant No. 5 was the owner of the eight-anna share of the tenures, which was afterwards purchased from him by the defendants Nos. 1, 2 and 3, the plaintiffs took from him a lease of that share and of certain other mehals at a consolidated rent of Rs. 341; and the defendants Nos. 1, 2 and 3, by purchasing the interest of defendant No. 5 in the tenures in question, became entitled to a proportionate share of the Rs. 341 from the plaintiffs; and that it was by reason of the plaintiffs' default in not paying that share, that the defendants Nos. 1, 2 and 3 could not pay their rents to the zemindar. They there-fore contended that the sum paid by the plaintiffs to redeem

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KHATOON.

Judgment.

GANTH, C.J.

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the tenures from sale, must be considered, in accordance with the provisions of section 13 of Regulation VIII of 181 of section 62, Act VIII of 1869 (B.C.), as a payment pro of the rent due to them from the plaintiffs in respect of the annas share ; or at any rate that their claim against the tiffs for a proportion of this rent should be allowed as against so much of the plaintiffs' claim as the Court consider to be their proper amount of contribution.

The Moonsiff held that the defendants Nos. 1, 2 and 3 could not avail themselves of this counter-claim against the plaintiff in either way. He found that there was a dispute between the parties as to how much of the entire jumma Rs. 341 was due from the plaintiffs to those defendants, and that there was no written agreement to guide him in the matter, and that the cross-claim under the circumstances must be the subject of another suit.

The District Judge took a different view. He considered the claim against the plaintiffs, made by the defendants Nos. 2 and 3, would, if the amount of it equalled or exceeded the contribution due to the plaintiffs from those defendants, be a complete answer to the suit as against them. He said that it is only in the event of plaintiffs not being in arrears that the defendants can treat their deposit (that is, their payment of the jumma under the decree) as a loan to the defendants. It will be necessary to determine the amount of rent due by the plaintiffs and whether they have paid. It can then be found, whether or not the plaintiffs are in arrears. If they are not in arrears, the deposit must be treated as a loan ; if the deposit is greater than the arrears, the balance can be treated as a loan ; otherwise it is not.

Upon this, the case was remanded to the Moonsiff, who went into the question of the amount of jumma due from the plaintiffs to the defendants Nos. 1, 2 and 3 in respect of their eight annas share in the tenures, and decided it upon a basis which, according to his calculation, entitled the plaintiffs to cover a certain sum from those defendants, as well as from defendant No. 4.

The defendants Nos. 1, 2 and 3 then appealed to the District Judge, who disposed of the same question in the same manner as the Moonsiff.

er principle, and, in the result, decided the suit, so far as the ibution from the defendants Nos. 1, 2 and 3 was con- d, in their favour, thus reversing the first Court's decree ainst them.

e plaintiffs now come upon special appeal to this Court, hey contend, first, that the cross-claim made by the defen- : Nos. 1, 2 and 3 ought not to be entertained at all is suit; and, secondly, that, if it ought to be entertained, amount of it has not been ascertained upon the right iple.

on the last of these points, it is sufficient to say that neither e lower Courts has, in our opinion, ascertained the amount the proper principle. The Moonsiff's view is quite erro- ; and, although the District Judge is right so far as he in taking the sudder rent into account, there are other erations which he ought to have gone into before he could arrived at a proper estimate of the amount due from the s. It is not necessary for us, however, to enter upon onsiderations, because we are of opinion, upon the first that the cross-claim of the defendants Nos. 1, 2 and t not to have been entertained in this suit at all.

appears to us that, under the circumstances, the provi- of section 13, Regulation VIII of 1819, or of section 62, VII (B.C.) of 1869, cannot properly be made applicable cross-claim of those defendants, and that they must ecourse to another suit for the purpose of enforcing it. it was brought to recover from the defendants the amount decrees for rent, which they were jointly bound to pay to indar. As the defendants made default in paying that to the zemindar, the plaintiffs were compelled to pay it, to prevent the forfeiture of their own sub-tenure. This now brought to recover the amount so paid from all the nts; and although the Court, in decreeing the plaintiff's ight with propriety determine how much of that amount to be paid by each of the defendants, there is no doubt proper form of the decree would have been, that the should recover the whole sum claimed from all the nts, although, as between the defendants themselves, the

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Judgment.

GARTH, C.J.

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amount of their respective contribution was that which the Court decreed.

But, on the other hand, the cross-claim made by the defendants Nos. 1, 2 and 3 is alleged to be due from the plaintiffs to those defendants only; and therefore cannot, we think, properly be credited, under section 13 of Regulation VII of 1819, against a claim due from all the defendants. It appears to us that the credit allowed under that section must be a mutual credit, due to and from the same parties, in the same way as an ordinary set-off; and that the defendants Nos. 1, 2 and 3 are not entitled under that clause to a credit which is due only to them, and not to all the defendants, against whom the plaintiffs have a right to enforce their claim.

In this particular case, there is another difficulty in allowing such a credit under section 13; because the sum said to be due from the plaintiffs to the defendants Nos. 1, 2 and 3 is only an unascertained portion of an entire rent, due to those defendants and the defendant No. 5, not only in respect of a share in the tenures in question, but also of several other properties; that before any credit could be given to the defendants in this suit, the proportion of the entire rent due in respect of the annual share of the tenures in question would have to be ascertained. We think, therefore, that the cross-claim is not admissible, as an answer to the suit against the first three defendants, and for the same reasons, it is clearly not available by way of set-off. It is essential to the validity of a set-off, that the debt should be mutual, due from and to the same parties and in the same right; whereas, as we have already explained, this suit is one which from its very nature could only be brought against the defendants, whilst the cross-claim is admittedly due only from the defendants Nos. 1, 2 and 3.

We think, therefore, that the District Judge was wrong in remanding the case at all. But, as there is no doubt that the defendants Nos. 1, 2 and 3 have a considerable claim against the plaintiffs, the timely adjustment of which might have rendered this suit unnecessary, we think that the remand ordered by the Judge and all the subsequent proceedings should be set aside; that the defendants should pay to the plaintiffs the amount

of the first appeal to the District Judge, which ought to have been decided in their favour without any remand; and that each of the parties should pay their own costs of the subsequent proceedings in the lower Courts, which have turned out to be unnecessary, but that the costs of this appeal should be paid by the defendants Nos. 1, 2 and 3.

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## [CIVIL APPELLATE JURISDICTION.]

DEBENDRO MOHUN TAGORE AND }  
 ANOTHER. . . . . } DEFENDANTS;  
 AND  
 DEBENDRO MONEE . . . . . PLAINTIFF.

June 3.

*Sale of Patni Talook—Service of Notice—Sufficient Service—Defaulting Co-sharer—Benamsee purchase—Regulation VIII of 1819, section 8—Constructive Trustee.*

A and B were co-sharers of a patni which was sold for arrears of rent by the zemindar and purchased by C. In a suit by A against B, C, and the zemindar, the plaintiff alleged: (1) That no sufficient notice had been given; and, (2) that C purchased benamsee for B. *Held*, on the question of notice, that once it was found that the notice had been posted up in the catcherry of the defaulter in accordance with clause 2, section 8, Regulation VIII of 1819, it was not essential to the validity of the sale that any other notice should have been given to the defaulters themselves, or that the service should have been verified in the manner directed by the section. *Held*, also,—the benamsee purchase having been proved,—that the sale must be considered good as far as the zemindar was concerned, and therefore the suit as against him must be dismissed with costs; and that as against B the parties were in exactly the same position as before the sale, B being a constructive trustee for A.

*Sona Bibee vs. Lall Chand Chowdhry*, 9 W. R., 242; and *Koylash Chunder Banerjee vs. Kales Prosonno Chowdhry*, 16 W. R., 80, cited and followed.

**SPECIAL APPEAL** from a decree passed by the Judge of Meerapore, affirming that of the Subordinate Judge of that district.

This was a suit to set aside the sale of a patni talook, on the ground of want of notice and illegality. Up to the year 1278, the patni talook in dispute belonged to, and was recorded in the



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names of Abdool Kader, Anis Caze, Faizudeen, and Nawab Khan. Abdool Kader owned a moiety of the talook, and, on the 31st of Bhadro 1278, he sold the whole right and interest of his share to the plaintiff. The name of Abdool Kader was continued on the record, but the moiety of the rent was paid by the plaintiff to the zemindar, and receipts given by the latter to the plaintiff. Shortly after the plaintiff's purchase the remaining moiety was sold to Hurro Chunder Ghose and Issur Chunder Bose, who made default in the payment of the rent due for the last six months of 1280. The patni talook was put up for sale on the 14th of May 1874, under the provisions of Regulation VIII of 1819, and bought by one Dwarkanath Sircar.

The plaintiff contended that the notification of sale was irregular, in that she had not been served with a copy; and also that the purchase by Dwarkanath was merely benamee for Hurro Chunder and Issur Chunder. On the question of notice the first Court said: "There appears to be sufficient evidence on the record to show that the defaulters and the general public were fully made known of the notification and the intended sale. There is no evidence to show that plaintiff's agent attempted to stay the sale by requesting the zemindar's mokhtar to give him time to pay off the arrears." He found that the purchase was a benamee one, and he decreed the suit with costs as against Hurro Chunder and Issur Chunder, but dismissed it with costs as against the zemindar. On appeal, the Judge held that the lower Court was wrong in holding that it was not necessary notice should have been given to the plaintiff, even though she was not one of the recorded proprietors; he also found that the purchase was benamee; and he decreed the suit with costs against all the defendants. The defendants then specially appealed to the High Court.

*Baboo Sree Nath Dass*, for Appellant.

*Moonshee Serajul Islam*, for Respondent.

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 June 3.

The judgment of the High Court (1) was delivered by  
 GARTH, C.J. GARTH, C. J. :—

This was a suit brought by the plaintiff to set aside the sale

(1) GARTH, C.J., and TOTTENHAM, J.

a patni talook, made under Regulation VIII of 1819. The plaintiff was part owner of the patni in question with the defendants Nos. 4 and 5; the defendants Nos. 1 and 2 were the zemindars who put it up for sale; and the defendant No. 6 was the purchaser at the sale. The parties whose names were registered as owners of the talook in the zemindar's sherishta were Abdul Kader, Anis Caze, Faizuddeen Mundul, and Nawab Khan. The plaintiff's name did not appear there at all.

The grounds upon which the plaintiff contends that the sale could be set aside are, (1) that no notice was given to her of the intended sale; and (2) that the defendant No. 6 purchased the patni on behalf of the defendants Nos. 4 and 5, who were prohibited from purchasing by section 9 of the Regulation.

The Sub-Judge found that there was sufficient notice of the sale, but decided in favour of the plaintiff on the ground that defendant No. 6 was the benameedar of defendants Nos. 4 and 5, and purchased the property for them. The District Judge held the sale void upon both grounds; considering that the plaintiff, as a part owner of the talook, should have had personal notice of the intended sale; and also that the sale was void *in toto* in consequence of the defendants Nos. 4 and 5 being the purchasers.

We consider that he has mistaken the law upon both points. Regarding the first, it was not disputed that a proper notice was published at the cutcherry of the defaulters, in accordance with section 8, clause 2, of the Regulation; and if this was properly done, we consider that it was not essential to the validity of the sale that any other notice should have been given to the defaulters themselves, or that the service of the notice should have been effected in the manner directed by the section. See *Sona Bibee Lall Chand Chowdhry*, 9 W. R., 242. With regard to the second point, we think that the fact of the tenure being leased by the defendants Nos. 4 and 5 does not avoid the sale against the zemindars. Whether the purchase is made by one or all of the owners of the tenure, the zemindar, if he consents, may treat it as valid. The only consequence is, in a case like the present, that the owners who purchase must be considered as trustees for the other owners, at the option of the

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GAETH, C.J.

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Judgment.

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latter; and in that case the property in the tenure remains precisely as it did before the sale. This view of the law is in accordance with the ruling of NORMAN and AINSLIE, J.J., in the case of *Koylash Chunder Banerjee and another vs. Kalee Prasanna Chowdhry and another*, 16 W. R., 80, with which we quite agree.

The result is, that, as against the defendants Nos. 1, 2 and 3, the plaintiffs' suit will be dismissed with costs in all the Courts, and interest at 6 per cent. As against the other defendants, who have attempted a fraud upon the plaintiffs, by insisting that the purchase was made by the defendant No. 4 in his own right, the plaintiff is entitled to a declaration, that the defendants Nos. 4 and 5 have purchased the tenure on her account as well as for themselves, and that she is entitled against them to her eight annas share in the tenure, and also to her costs in all the Courts, with interest at 6 per cent.

## [CIVIL APPELLATE JURISDICTION.]

June 3. BEHARI LALL SANDYAL . . . . . PETITIONER  
AND  
JUGGO MOHUN GOSSAIN . . . . . CAVEATOR.

*Will—Power of disposition by Will—Probate, application for—Grant of Probate—Title to property disposed of—Hindu widows' power to make a will.*

Where an application for probate of a will is made *bond fide*, it is the province of the Court to go into questions of title with reference to the property of which the will purports to dispose.

Hindu widows are no more disentitled to make a will disposing of their property than any other class of persons.

**R**EGULAR APPEAL from an order passed by the Judge Hooghly.

This was an application for probate of the will of Kadumkha the widow of Nund Mohun Gossain. The application was made by the Executor Behari Lall Sandyal, the brother of the deceased; it was opposed by Juggo Mohun Gossain, the sole surviving brother of Nund Mohun, who denied the genuineness of the will as well as the power of the lady to devise the property.

mentioned therein, which he alleged to be the ancestral estate of Nund Mohun, in which the widow had only a life interest.

Two issues were raised in the Court below : First—Is the will the last will of the deceased Kadumbini Dabee ; and is Behari Lal Sandyal entitled to receive probate thereof as her executor ?

Secondly—Was the deceased, Kadumbini Dabee, entitled to make a will disposing of the property that she inherited from Nilmadhub Gossain, (a son whom she had adopted under the authority of her husband, and who had predeceased her, unmarried,) that property with accumulations that he had inherited from Nund Mohun Gossain, his adoptive father.

On the first issue it was found that the will was genuine and properly executed. The petitioner then objected to a consideration of the matter in the second issue. The objection was overruled on the ground that as, ordinarily, the widow would have no power to make a will, it was necessary to determine that point.

The property dealt with in the will consisted of (1) a house and Rs. 7,400 in Company's paper, which were in possession of the testatrix ; and (2) Rs. 15,000 which were in the hands of the heirs of Nund Mohun Gossain, the eldest brother of Nund Mohun. The learned Judge held that there was no evidence that the testatrix had any *streedhun* except a few ornaments ; that the Rs. 15,000 was part of the husband's estate in which the widow had only a life interest ; that the house and the Company's paper (Rs. 7,400) were accumulations from her husband's estate over which she had no power ; and he refused probate of the will, on the ground that the properties attempted to be disposed of therein were part of the husband's ancestral estate. The petitioner failed.

*Baboo Tarini Kant Bhattacharji*, for Appellant.

*Phillips*, for the Respondent. *Baboo Opendro Chunder Bose*, for him.

The judgment of the Court (1) was delivered by

*GARTH, C.J.* :—

The questions involved in this case are of great general

(1) *GARTH, C. J.*, and *McDONELL, J.*

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Judgment.

GARTH, C.J.

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importance; and, having considered them carefully, we are of opinion that the view taken by the Judge in the Court below was erroneous. [His Lordship here stated the facts above set out, and continued.]

*Judgment.*

GARTH, C.J.

It has been argued for appellant: *first*, that the question raised by the second issue was one which the Judge had no right to entertain in a proceeding of this nature; and *secondly*, that even if he had a right to decide whether the testatrix had any disposable property at all, there was sufficient evidence that she had some *streedhun*, which would be quite enough to justify the grant of probate. We do not think it expedient to enter upon the consideration of this latter point because we do not wish to prejudice the rights of either party in case of any future litigation upon that subject. It is sufficient for us to say that if it were necessary to establish that the lady had some *streedhun*, we think there is sufficient evidence of that fact to justify the grant of probate. But it is not necessary, in our opinion, to enter upon these considerations, because we think that, upon an application for probate of a will, so long as it is made *bona fide*, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose.

Since the passing of the Succession Act (Act X of 1865) no executor can make title to any property of the testator, whether disposed of by the will or not, nor can he sue for or claim any such property, or clothe himself with his representative character for the purpose of collecting or paying debts, or otherwise legally intermeddling with the affairs of the testator, without first obtaining probate of the will. Nor, again, can any person, who may be interested under the will, devisees or others to whom property is bequeathed, make any title or attempt to enforce their right to it, unless probate of the will has first been obtained. On the other hand, it is clear that the grant of probate to the executor does not confer upon him any title to the property which the testatrix had no right to dispose of. It only perfects the representative title of the executor to the property which did belong to the testatrix and over which she had a disposing power.

r. Phillips endeavoured to make a distinction in the case  
 wills made by Hindoo widows, upon the ground that *prima*  
 they have no right to make a will; and this apparently  
 one of the considerations which influenced the Judge in  
 Court below. But there is no rule of law that we are  
 aware of which forbids a Hindoo widow to make a will of  
 property which belongs exclusively to herself. She cannot,  
 except for special purposes, alienate her husband's estate by  
 will or otherwise, because she has only a life interest in it. But  
 she is only like other persons in that respect, and the grant of  
 the will to the executor in this case will not prejudice in any  
 way the objector's right, if the property really belong to him  
 and not to the testatrix.

2. Phillips also argued that, under section 240 of the  
 Indian Act, the Judge had no right to grant probate, un-  
 less the testatrix in this case had a fixed place of abode, and some  
 property, moveable or immovable, within the jurisdiction of the  
 Court. But this is really an objection to the jurisdic-  
 tion of the Judge, and it was never raised in the Court below;  
 moreover, if it had been, it appears that the testatrix had  
 a fixed abode at the time she died within the district. We are  
 of opinion, therefore, that the judgment of the Court below  
 should be reversed, and that probate should be granted to the  
 executor in accordance with the petition.

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Judgment.

GARTH, C.J.

## [CIVIL REFERENCE.]

1878  
June 17.

OMIRTOLALL DEY . . . . . PLAINTIFF

AND

A. HOWELL . . . . . DEFENDANT

*Promissory note—Payable on Demand—Limitation—Act IX of Schedule II, Art. 72—Act XV of 1877, section 2, and Schedule Art. 73.*

Under Act IX of 1871, the limitation on a promissory note on demand was three years from the date of making the demand. Under Act XV of 1877 the limitation is three years from the date of the note: *Held*, that the period of limitation so prescribed by Act XV of 1877 is shorter than that prescribed by Act IX of 1871, the meaning of section 2 of Act XV of 1877.

**REFERENCE** to the High Court under Act IX of 1871, section 55, from the Calcutta Court of Small Causes.

The case is stated as follows: "This suit was instituted on the 4th of March 1878, and is brought on a promissory note for Rs. 148, payable on demand, with interest at the rate of one per rupee per month. The promissory note is dated the 1st of January 1874. No evidence has been taken, the facts being admitted by both sides; and the only plea is that of limitation. The first demand was made some time in 1876, another in March 1877, and a third about two weeks before the institution of the suit. No payment, either in respect of principal or interest, has been made on the note.

"Had the suit been brought under the Indian Limitation Act of 1871, the plaintiff would have been in time, because under section 72 of the second Schedule to that Act, the period of three years would begin to run from the time when the demand was made. But the suit is brought under the Indian Limitation Act of 1877, and by Article 73 of the second Schedule of that Act the period of three years begins to run from the date of the note. It is contended, however, that under section 2 of the last mentioned Act, the plaintiff has two years from the 1st of October 1877.

cause the period of limitation prescribed for a suit of this nature by the Indian Limitation Act, 1871, is shortened by the later Act, and it is said that you cannot calculate the period of limitation as shorter until you also take into consideration the time from which the limitation begins to run, but I am of opinion the term "period of limitation" is used with sufficient clearness all through the Act; and refers to specific periods such as are set out in the second column of the second Schedule; the right to sue is perhaps curtailed by the later Act but not the period of limitation. There is no great hardship in this, for the Indian Limitation Act, 1877, did not come into force till more than two months after it became law. Under the circumstances referred to, I am of opinion that plaintiff's suit is barred."

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A. HOWELL.  
Judgment.

The judgment of the High Court (1) on the reference submitted is as follows:—

We think that the plaintiff's suit is not barred; and that under section 2 of the Limitation Act, 1877, he has two years from the 1st of October 1877, within which to bring his suit. Neither of the Limitation Acts altered, or professed to alter, the legal effect of promissory notes payable on demand. The legal effect of the law in this case was the same after the passing of the Act of 1877, as it was before. The plaintiff might at any time, if he had so desired, have brought his suit upon the note without making any demand of payment; and a demand was not made necessary to exhaust plaintiff's right of action, merely because Article 72 of the Indian Limitation Act of 1871 might have been founded upon a misapprehension of the law. The Act of 1871, therefore, did in fact give the holder of a promissory note, payable on demand, a longer time for bringing his suit upon it, than the Act of 1877. The latter Act gave him three years from the time when the note was due. The former Act gave him three years from the time when he made a demand of payment; and it is clear that no demand of payment could have been made until after the note had been given. This construction, which seems to be the reasonable one, of section 2, may probably be the means of preventing much injustice.

(1) GARTH, C.J., and MARETT, J.



## [CIVIL REFERENCE.]

1878  
June 17.

SREEMUTTY MATONGINY DOSSEE. . . PLAINTIFF  
AND  
RAMNARAIN SADKHAN. . . . . DEFENDANT

*Registration—Mortgage Bond—Evidence—Admissible in Evidence  
Act VIII of 1871, sections 17 and 49.*

Where a bond mortgages certain property as security for a loan provides that, in default, the mortgagee may take proceedings to the amount of the loan from the property mortgaged, such bond, if not registered, will not be admissible in evidence in a suit to recover the money lent and interest.

Act XX of 1866, Act VIII of 1871, and III of 1877, sections 17 and 49, discussed.

*Luchmiput Singh Dugar vs. Mirza Khairat Ali*, 4 B. L. R., 1878, cited.

**R**EFERENCE under Act IX of 1850, section 55, from the file of the Court of Small Causes at Calcutta.

The plaintiff in this case sued for "money due on a loan with interest on mortgage." She claimed Rs. 203-14. The "deed" referred to, after setting out a list of properties belonging to the defendant, proceeds as follows: "I borrow the sum of Rs. 200 from you on mortgage thereof [of the land before me] with interest at the rate of 24 per cent. per annum, which I shall pay monthly, and shall re-pay the whole amount within 23rd of Chytr of this year (April 5th, 1875). In default of paying the debt within the term aforesaid, you shall have the mortgaged property sold by instituting legal proceedings. Should the sale thereof not cover the whole amount, you shall have to realize the balance by having my other landed properties disposed of. On the above condition I do hereby execute this mortgage deed, having mortgaged the above piece of land together with the title deeds thereof." Dated 23rd Assin 1274 (1874) of October 1874).

It was objected that the instrument above set out, not being registered, was not admissible as evidence of the transaction.

in respect of which the money was claimed, and the Judge of the Small Cause Court upheld the objection, on the provisions of sections 17 and 49 of Act VIII of 1871, and of Act III of 1877, contingent upon the opinion of the High Court.

*Bonnerjee*, for the Plaintiff.

The document ought to have been admitted, not for the purpose of affecting the immoveable property mentioned in it, but for showing that the plaintiff had lent money to the defendant, and that the defendant had promised to re-pay it. Section 49 of Act III of 1871, which governs this case, is far less stringent than section 49 of the Registration Act of 1866, and yet under this latter Act an unregistered mortgage bond was allowed in as evidence of the defendant's indebtedness.—*Woodoy Chand Jana vs. Jyotiya Mundul*, 9 W. R., 111; and this case was approved of in *Nilmadhub Sing Dass vs. Futteh Chand Sahu*, 3 B. L. R., A. C., 11. In *Shibprasad Das vs. Anna Purna Dayi*, 3 B. L. R., A. C., 11, an unregistered bill of sale was admitted in evidence for the same purpose; and in *Lutchmiput Singh Dugar vs. Mirza Khairat*, 4 B. L. R., 18 F. B., the Full Bench decided that an unregistered bond was admissible in evidence to bind the obligor personally, though not to prove that the obligee was entitled to the security of the land.

[GARTH, C.J.—In the cases you have cited the documents were admissible. The present document is not so.]

*Bonnerjee*.—The mere absence of a covenant to pay makes no difference.—*Jogeswar Dutt vs. Nilsa Chund Chuckerbutty*, 4 B. L. R., App., 48. In that case the terms of the bond were substantially the same as those of the bond in the present case, and a decree was given against the defendant's moveable property. Counsel also referred to *Stri Seshathri Ayyengar vs. Sandara*, 7 Mad., 296; *Guduri Jagamadhan vs. Rapada Armana*, Mad., 348.

The judgment of the High Court (1) is as follows :—

*Judgment.*

We think that the Judge is quite right in holding that the document in question is not admissible in evidence.

(1) GARTH, C.J., and MARKBY, J.

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MATONGINY  
DOSSEN  
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SADKHAH.  
Argument.

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RAMNABAIN  
SADKHAH.

Judgment.

It has been argued by Mr. Bonnerjee, on behalf of the appellant, that we are concluded here by the authority of the Full Bench case of *Luchmiput Singh Dugar vs. Mirza Khairat Ali*, 1 B. L. R., F. B., 18, which was decided under the provisions of Act XX of 1866, section 49. The words of that section run as follows: "No instrument required by section 17 to be registered shall be received in evidence in any civil proceeding in this Court, or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act;" and it was held by the Full Bench that, when a document was divisible in its nature, and consisted partly of a bond for Rs. 2,000 and partly of a mortgage of certain property to secure payment of the money, the document was receivable in evidence, without registration, for the purpose of covering the bond debt, though it was not so admissible for the purpose of enforcing the security. The Court seems to have considered that the general words, "No document shall be received in any Civil Court," ought not to be read in their literal sense, but only as rendering the document inadmissible in evidence, for the purpose of affecting the mortgaged property.

The words of the present Act are different. Section 49 states that "no document required by section 17 to be registered shall, without being registered, be received as evidence of any transaction affecting" any immoveable property comprised therein. Now in this case the document is not divisible. It closes one transaction only, and that the transaction which the plaintiff must necessarily prove for the purpose of making her case.

It may be doubtful, indeed, whether, having regard to the terms of the loan, the defendant is personally liable for the money, and whether the only remedy of the plaintiff is against the mortgaged property. But, whether this was or was not, the transaction was single and indivisible, and we think it is impossible to say, having regard to the words of section 49, that the instrument was admissible in evidence for the purpose of proving that transaction.

## [CIVIL REFERENCE.]

1878  
June 17.

BUDDY AND OTHERS . . . . . PLAINTIFFS ;

AND

HAM AND ANOTHER . . . . . DEFENDANTS.

*property of wife—Wife carrying on business on her own account—  
Husband's liability for wife's debts—Act III of 1874.*

here a wife carries on a separate business on her own account which her husband has no concern, a decree for debts incurred a management of that business should be given against the wife a, to be executed against her separate property only.

ERENCE to the High Court in its Ordinary Original jurisdiction, under section 55 of Act IX of 1850, from the Court of Small Causes.

case is thus stated: "These are twenty-four separate suits by Durzees for wages due to them. In each suit I am the plaintiff a judgment, for the sum set against his the accompanying list, against the first defendant only. judgments are contingent on the opinion of the High upon the case stated hereunder, whether or not judgment have been given against the second defendant also, by the plaintiffs?

first defendant is Annie Braham, the second is her husband Braham. They are sued together as carrying on under the name and firm of "Madam Greenwood." both English, and were married in England in the year they came out to this country in the year 1858, and return to England.

Braham describes himself as an iron-monger and broker and his wife live together in Calcutta, but the wife, name of Madam Greenwood, carries on, separately from him, the trade of a milliner. This business was started four years ago with some money advanced by the husband for that purpose. He has no concern with, or interest

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 ALTEMUDDY  
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 ———  
 Statement.

in, the millinery business. It is carried on by the wife as by the husband. The plaintiffs were engaged by the wife for the purpose of her millinery business. The property in respect of which the contracts sued upon were made is, under section 4 of Act III of 1874, the separate property of the wife. The effect of that Act is, I think, to abolish the doctrine of unity of person between husband and wife. In *Harris vs. Harris*, L. R. 1 Cal., 285, it was held that a wife as plaintiff could sue her husband as defendant in respect of her own property even after the marriage. From the language of sections 7 and 8 of the Act, and especially from the proviso in section 8, I infer that the husband is in no way liable under the circumstances of this case. The Act however has not in express terms provided that he shall not be liable. For the purpose of this judgment I have assumed that the case is governed by Act III of 1874, the Married Woman's Property Act, and have given judgment against the wife alone to be satisfied by execution against her separate property. There is nothing in the language of section 4 of Act III of 1874 which expressly limits its operation, nevertheless I am inclined to think, from the language of the preamble and section 2 of the Act, that it was only intended to apply to the case of such marriages as those to which section 4 of the Indian Succession Act, X of 1865, applies.

"In *Miller vs. The Administrator-General of Bengal*, L. R. 1 Cal., 412, MARKBY, J., discussed very fully the operation of section 4 and section 44 of the Indian Succession Act of 1865, and held that section 4 of that Act does not apply to the case of the moveable property of a person not having a domicile in India. In that case two persons having an English domicile were married in India in April 1866. If section 4 of the Indian Succession Act did not apply in that case, still less would it apply where a marriage between two persons having an English domicile were married in England so long ago as 1854. The Statute, called the Married Woman's Property Act, 33 Vic., chap. 93, has no force in India, and if the corresponding Act of the Indian Legislature, III of 1874, does not apply in the circumstances of the present case, I apprehend judgment should have been given against the husband.

The judgment of the High Court (1) on the case submitted is as follows :—

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ALEXMUDDY

v.

A. BRAHAM.

Judgment.

It being found as a fact that the millinery business was carried by the wife alone, and that the husband had no concern in it, we think it clear that the Judge was right in giving a decree against the wife alone. The husband could only be made liable in such a case upon the principle that the wife was impliedly acting on the business as his agent; and we consider that any such implication is excluded by the provisions of the Act, and the facts as found in the case. We also think that the decree should be executed only against the wife's separate property; and that the form of it should be limited accordingly.

(1) GARTH C.J., and MARKBY, J.

### [CIVIL REFERENCE.]

MACKINTOSH . . . . . PLAINTIFF; June 17.

AND

PHIL WINGROVE . . . . . DEFENDANT.

*Unconscionable Bargains—Extortion—Ignorance of Contract entered into—Misunderstanding of terms of Contract—Equitable Relief.*

Where a party reaps the benefit of a fair and reasonable contract, into which he has entered, the fact of his not understanding its nature would be no valid answer to a claim arising out of it. And, where a party enters into a contract, the terms of which he understands and agrees to, it is no answer to a claim arising out of it that the bargain was an extortionate one.

But where an extortionate bargain, likely to be misunderstood, is made with a person who is ignorant of its true nature, a Court of equity will relieve the latter from the consequences of his act.

*Mackintosh vs. Hunt*, I. L. R., 2 Cal., 202, considered and explained.

REFERENCE to the High Court, under section 55, Act IX of 1858, from the Court of Small Causes at Calcutta.

The case is stated as follows :—“ This suit is brought to recover Rs. 100, as principal and interest due on a promissory note dated the 23rd June 1874, which was made by the defendant and

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two others. John Wingrove, one of the other maker, was, the first instance sued, but, as the summons cannot be converted on him, a non-suit has been elected as against him, the third maker, has not been sued.

"Before the making of the note, John Wingrove and Wingrove came at different times to the plaintiffs. They Rs. 100 each. He told them that his rule was to deduct discount or interest from the date of the note to the due date, and agreed that he should deduct the discount out of the going to them, and on this agreement the arrangement entered into. Accordingly five notes for Rs. 20 each were drawn up and signed by both of them. These may be John Wingrove's notes. Another five notes for Rs. 20 each were also drawn up and signed by both of them. These were called Rachel Wingrove's notes. Both the parties have paid some of these notes in full. In return for each five notes John and Rachel Wingrove each received a cheque for Rs. 81-4-0; that is to say, according to the agreement, Rs. 10 was deducted from the amount which ought to have been paid on each note. In point of fact, therefore, the real sum advanced on each note (including of course the note now sued) was Rs. 16-14-0, and not Rs. 20 as stated in the note. The note was signed by both parties in the plaintiff's presence. On the authority of *Mackintosh vs. Hunt*, 1. L. R., 2 Cal., the defendant, through her pleader, now seeks equitable relief. She contends that she ought only to be adjudged to pay Rs. 10 interest at 12 per cent. from the due date of the note, as she has already paid Rs. 10 as interest.

"With the exception of the omission of the words 'principals,' the wording of the note in question is, *mutatis mutandis*, exactly the same as that in the case cited. In both cases the material facts are to all intents and purposes similar, excepting this difference that, in the case cited, *Hunt*, the defendant was not aware of the real nature of the transaction, having signed the note without taking the trouble to read it when she signed it, and in this case the defendant was aware of the real nature of the transaction. It is contended, therefore, by the plaintiff's pleader that the defendant, being fully aware of the nature

of the transaction, is not entitled to equitable relief, the case of *Mackintosh vs. Hunt* having been decided mainly on the ground that the defendant there was not aware of the real nature of the transaction. Such, no doubt, was one of the grounds, but was only one out of four; and, as I read it, the main ground relied on by the High Court was that the promissory note did not truly state the transaction between the parties. I am of opinion therefore that, considering the promissory note does not truly state the transaction between the parties, that the rate of interest is grossly exorbitant, and the consideration grossly inadequate, the defendant is entitled to equitable relief. The question is one of some importance, and as I am informed that the causes are likely to turn on this one, and I also feel considerable doubt in the matter, I think it better to refer for the opinion of the High Court the following question:—Whether, under the circumstances stated, the defendant is entitled to equitable relief?”

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The judgment of the High Court (1) on the reference submitted follows:—

The learned Judge has somewhat misconceived the true principle of the decision in *Mackintosh vs. Hunt*, I. L. R., 2 Cal.,

The equitable defence which formed the ground of the Court's judgment in that case was founded upon two considerations, neither of which would have been sufficient without the other, namely—*first*, that the bargain made by Mackintosh with the defendant Hunt was grossly extortionate, and calculated to deceive an unwary young man as to its real character; and, *secondly*, that, although the other maker of the note, Norman Dutt, had understood the nature of the transaction, it appeared that the defendant Hunt did never even read the note, and was not aware of its true meaning.

If there had been nothing unfair or unreasonable in the contract itself, and the defendant had reaped the benefit of it, the fact of his not understanding its nature would have been no answer to the claim. Or, on the other hand, however extortionate the bargain might have been, if the defendant

(1) GARTH, C.J., and MARESBY, J.



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 ———  
*Judgment.*  
 ———

thoroughly understood and consented to it, there would have been no ground for equitable interference. It was only the concurrence of the two elements,—an inequitable bargain, and ignorance of the unfair nature of the transaction on the part of the defendant, which justified the Court in modifying the decree.

In this case the Judge finds as a fact that the defendant was perfectly aware of the contract which she made; and consequently the principle of *Mackintosh vs. Hunt* does not apply. If people with their eyes open choose wilfully and knowingly enter into unconscionable bargains, the law has no right to protect them.

[ORIGINAL CIVIL JURISDICTION.]

June 18. **IN THE GOODS OF MALCOLM GASPER . . .** (DECEASED)  
*Probate—Grant of Probate—Ad valorem Duty—Duty not payable—*  
*Probate first granted—Court Fees' Act, 1870.*

In 1862 a grant of probate was made to one of several executors; no *ad valorem* duty was charged or, as the law then stood, payable. At the death of that executor, a second grant of probate was made to other executors of the same testator, who claimed to be exempted from the payment of the *ad valorem* fee prescribed by No. 11, Sch. I of Court Fees' Act, 1870, on the ground that no *ad valorem* fee was chargeable at the time the first grant of probate was made: *held*, that under the provisions of the Court Fees' Act, and of Financial Notification No. 2623, published in the *Gazette of India* of April 25th, 1874, the *ad valorem* fee was clearly chargeable when the second grant of probate was made.

In the goods of *Chalmers*, 6 B. L. R., Appendix, 137, followed. In the matter of the executors of *James Mann, Earl of Carnarvon*, deceased, 25 L. J., Exch., 149, distinguished.

**REFERENCE** to Sir RICHARD GARTH, Chief Justice, from the Taxing Officer of the High Court in its Ordinary Original Civil Jurisdiction. The terms of the reference are as follows:—

“In this case, exemption from the payment of the *ad valorem* fee prescribed by No. 11 of the first schedule to the Court Fees' Act, 1870, is claimed on the ground that no *ad valorem* fee was payable at the time the first grant of probate was made.”

1st, 1870, is claimed by the executors of the deceased upon the following facts:—The first grant of probate was made in 1862 to one of the executors, who has lately died. A second grant has now been made to two other executors. The *ad valorem* fee is chargeable only once in respect of the same property. It was not charged when the first grant was made, and is, therefore, now chargeable, i.e., upon the amount or value of the unadministered property and effects. The reason why it was not charged when the first grant was made, namely, because it was not then chargeable, affords no ground for exemption. This case is governed by the decision—*In the goods of W. G. Chalmers*, 6 B. L. R., Appendix, p. 137. Further, the Financial Notification No. 2623 of the *Gazette of India*, dated the 25th of April 1874, states as follows:—

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Reference.

In exercise of the power conferred by sections 35 of the Court Fees' Act, the Governor-General in Council is pleased to make the following regulation and remission:—

(a) Whenever a grant of probate or letters of administration shall have been made in respect of any property forming part of an estate, the amount of fees then actually paid under the said Act shall be deducted from a like grant is made in respect of property belonging to the same estate, or including the property to which the former grant was made.

(b). Whenever a grant of probate or letters of administration shall have been made in respect of any property belonging to an estate, no fees shall be payable under the said Act, when a like grant is made in respect of the whole or any part of the same property belonging to the same estate.

This notification applies to the whole of British India.

See also section 196 of the Court Fees' Act, added by section 1 of Act XIII of 1875."

Gregory, for the Executors.

Paul, (Advocate-General,) for the Government.

The decision of the Chief Justice on the reference submitted follows:—

THE, C.J.:—

I think it quite clear that the *ad valorem* duty must be paid upon the present grant of probate. At the time when

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the first grant was made to one of the executors named in the will, no *ad valorem* duty was payable. The only sum charged was a commission fee of Rs. 10. That executor has died, and the other two executors now wish to prove the will. Act VII of 1870 requires the *ad valorem* duty to be paid upon any grant of probate, and I find no provision exempting these executors from payment of the duty. In fact, but for the official notification made under the provisions of the Act, dated the 24th April 1874, the *ad valorem* fee would be payable a second time upon any second grant of probate. But here no injustice is done, because the duty has never been paid upon this property.

The case in 6 B. L. R., Appendix, 137, decided by Sir R. Colclough is in point, and is entirely in accordance with the view which I take of this question. The English case, to which my attention has been called by Mr. Gregory, (*In re the executors of James Mann, Earl of Cornwallis*, deceased, 25 L. J. Exch., 149), will be found to have no application to the present. That case merely decided that the Succession Duty Act of 1853 did not apply to annuities granted before the passing of the Act.

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## [CIVIL APPELLATE JURISDICTION.]

HOOB LALL AND ANOTHER . . . . . DEFENDANTS;  
 AND  
 JINGLE SINGH . . . . . PLAINTIFF.

1878  
 May 13.

*Stamp—Document requiring a stamp—Admissible in Evidence—Appeal—  
 Document admitted by Court of First Instance.*

Where a document is admitted by the Court of First Instance as not requiring a stamp, its admissibility cannot be questioned in special appeal.

*Enayetoollah vs. Shaikh Meajan*, 16 W. R., 6, followed.

SPECIAL APPEAL from a decree passed by the Judge of Moot, affirming that of the Moonsiff of Muzzufferpore.

The facts of the case are sufficiently set forth in the judgment. The only point taken in special appeal was as to whether a *teep* or acknowledgment executed by the defendants should have been taken to be a promissory note, and therefore inadmissible in evidence without a stamp.

*C. Gregory and Baboo Hem Chunder Banerjee*, for Appellant; *Baboo Mohesh Chunder Chowdhry*, and *Baboo Chunder Ghose*, for Respondent.

The judgment of the Court (1) was delivered by

McDONELL, J. :—

McDONELL, J.

The plaintiff sued to recover Rs. 994-5-9, principal with interest, under a *teep* executed by the defendants. Both the lower Courts have decreed the plaintiff's claim.

In special appeal, it is urged that the Courts below should have taken notice that the *teep* on which the plaintiff relies is a promissory note, and being insufficiently stamped as such is inadmissible in evidence.

(1) McDONELL and BROUGHTON, J.J.

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KNOSH LALL On the appeal being taken up, a preliminary objection was raised that no appeal lies in this case, inasmuch as where a document is admitted by the First Court as not requiring a stamp, its inadmissibility cannot be questioned in appeal. Various rulings of this Court have been cited in support of this objection, and it appears to us that the ruling in 16 W. R., 6—*Enayetoollah vs. Shaikh Meajan*, is on all fours with the present case. Therefore following that ruling we hold that the preliminary objection must prevail. The appeal is dismissed with costs.

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JUNGLE  
 SINGH.

Judgment.

McDONELL, J.

[CIVIL APPELLATE JURISDICTION.]

May 8. JOY KISTO COWAR . . . . . DEFENDANT;  
 AND  
 NITTYANUND NUNDY . . . . . PLAINTIFF.

*Minor—Ancestral Business—Minor's liability for debts—Partnership—Act IX of 1872, section 247—Appeal by one of two defendants—Decree of Appellate Court—Act, VIII of 1859, section 337.*

A minor, on whose behalf an ancestral business is carried on, cannot be held personally liable for debts incurred in that business.

On principle, there is no difference between the nature of the liability of an infant admitted by contract into a partnership, and that of one on whose behalf an ancestral trade is carried on by a manager. Consequently, in accordance with section 247 of the Contract Act, the liability of the former should be limited to the extent of his share in the ancestral business.

Where a decree, in a suit by a plaintiff against two defendants, has been acquiesced in by the plaintiff and one of the defendants, but appealed from by the other, the Appellate Court ought not, except as provided by Act VIII of 1859, section 337, change by its decree the relative positions of the plaintiff and the defendant who has not appealed.

*Petum Doss vs. Ramdhoss Doss*, Taylor, 279; *Ramlall Thakur vs. Lakhmichand*, 1 Bom. H. C. R., Appendix li; and *Jokurra vs. Sreegopal Misser*, I. L. R., 1; Cal., 470, cited.

**A**PPEAL from a decree passed by Mr. Justice MACPHERSON in the Original Civil Jurisdiction of the High Court.

This was a suit to recover the sum of Rs. 4,605-11-3, being the balance of an account between the plaintiffs and the defendants.

nts, for goods sold and delivered. The facts of the case are as follows :—Anundo Chunder Cowar, who had carried on business as a merchant in Calcutta, died intestate on the 17th of March 71, leaving surviving two widows and two infant sons, Nobo sto Cowar and Joy Kisto Cowar. After his death the business was carried on by the widows, who gave a power-of-attorney for that purpose to one Hurradhun Roy.

At the date of Anundo Chunder's death, there was a balance Rs. 570 due by him for gunnies sold and delivered by the plaintiff, who continued his dealings with the firm. Various payments on account of these transactions were made from time to time by Hurradhun Roy to the plaintiff. The accounts were settled on the 12th of April 1876, when the sum now sued for was found to be due to the plaintiff. It was alleged but denied by the defendant Nobo Kisto that he had attained majority in the latter part of 1875, and had since promised to pay the plaintiff's debt. It was admitted that the defendant Joy Kisto was still an infant. A guardian was appointed for him *ad litem*, and the case came on for hearing before Mr. Justice MACPHERSON.

As to the portion of the debt which accrued due in the lifetime of Anundo Chunder, the defence was limitation; as to that portion which had since accrued due, both the defendants pleaded infancy. No evidence was offered on behalf of the defendants, and a decree was given for the amount claimed, with interest and costs. The decree directed that the amount should be realized out of whatever property the defendants had succeeded to as heirs of Anundo Chunder. Joy Kisto Cowar appealed.

*Argument, for the Appellant.*

The portion of this debt was due at the death of the testator in 1830; as to that we shall contend that the suit is barred by limitation. We contend as to the remainder of the debt that the defendants are not liable, on the ground that the widows could not bind us on the trade so as to bind us; and that, even if they could, they had no power to delegate that power to any one. I admit that if the testator had died leaving one son of age and the other a minor, that the acts of the elder would bind the minor; but that is only the case where the trade is

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 —

carried on by a member of the joint family, which the widow In order to bind a minor the trade must have been carried by a person joint, that is, joint in estate, with the infant; this the mother is not. In fact, the widows ought to have as an English executor would do, that is, wind up the business with all convenient speed. Taking it for granted that the infants could carry on the business, yet they clearly cannot bind the infant, who would not be able to contract so as to bind himself at all events, they could not, by giving a power-of-attorney to Hurradhun to carry on the business, enable him to bind the infant. This case, it is submitted, is governed by section 1 of the Contract Act, which declares that the minor cannot be made personally liable for any obligation of the firm; if his share that is liable.

Counsel cited, on maintenance, and dependent members of family—*Vyavastha Darpana*, pp. 360, 270; position of a widow—*Khetramani Dasi vs. Kashinath Das*, 2 B. L. R. 1 (A. C.); *Srimati Bhagabati Dasi vs. Kanailal Mitter*, 8 B. L. R. 225; *S. M. Nistarini Dasi vs. Makhanlal Dutt*, 9 B. L. R. 11; on liability of testator's assets for debts contracted by a widow in carrying on a trade—*Cutbush vs. Cutbush*, 1 B. L. R. 184; on inability of infant to become a partner—*Petur Ramdhone Doss*, Taylor, 279; or to be bound by the acts of a manager—*Boykuntnath Roy Chowdhry vs. B. W. R.*, 2; *Radha Pershad Singh vs. Mussamut T. Kooer*, 20 W. R., 38; and on the powers of managers of a family—*Ramlal Thakursidas vs. Lakhmichand Muniram*, 14 B. L. R. 470; *Muddomutty Guptee vs. Bamasoondery Dosses*, 14 B. L. R. 21; *Mahomed Arsad Chowdhry vs. Yakoob Ally*, 15 B. L. R. 357.

*Branson and Allen*, for Respondents.

*Allen*.—In Hindu law a trade is an inheritance, and in this case it was the only thing the infants had to live on. It is admitted on the other side that if there had been a brother, he might bind the minor, but there is no dispute on this point, between the power of such a *karta* and the

the widow. She can assume all the functions of a *kurta* and do every thing required for the benefit of the property—*Hunooman Persaud Panday vs. Mussamut Baboo Munraj*, 6 Moore's Ind. Ap., 393; and this view is supported by the Bombay case and others quoted by the opposite side. The Contract Act does not apply to this case; there is no partnership here, but an ancestral business, which is a totally different thing.

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NUNDY.  
—  
Judgment.  
—  
GARTH, C.J.

The judgment of the Court (1) was delivered by

GARTH, C.J. :—

It appears that Anundo Chunder Cowar, the father of the appellant, who is an infant, died on the 17th of March 1871. Anundo Chunder, up to the time of his death, carried on business as a trader, and had dealings with the plaintiff's firm. He died, leaving him surviving the appellant and his elder brother Nobo Kisto, both then infants under the age of 16 years, and two widows. The sons and widows, after Anundo's death, lived as members of a joint Hindoo family, governed by the Dayabhaga school of Law. The ancestral trade was carried on under the management of the widows. The widows, being *pardah nasheen* women, could not take the management of the ancestral trade directly into their own hands, but employed their son-in-law, one Hurradhun Roy, for that purpose; and it was under the direct supervision and management of Hurradhun that the business was carried on. It was also proved, that the appellant's brother, Nobo Kisto, after he came of age, took part in the management with his brother-in-law, Hurradhun. During the sole management of Hurradhun, and also during the joint management of Nobo Kisto and Hurradhun, dealings with the plaintiff's firm continued; and in the course of these transactions the defendants became indebted to the plaintiff in the sum of Rs. 4,605-11-3. This debt entirely arises out of transactions connected with the ancestral business carried on in the defendants' family after Anundo Chunder's death. The plaintiffs brought a suit to recover the amount, and Mr. Justice OPPENSON has decreed the claim, with this reservation, that the

(1) GARTH, C.J., MARKBY and MITTER, J.J.



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GABTE, C.J.

amount decreed is to be realized out of the property of the deceased father, Anundo Chunder Cowar. Against this decree infant Joy Kisto has alone appealed.

The questions that we have to determine are, whether the appellant is at all liable for this debt; and if so, to what extent. It seems to us, that on the authority of decided cases, the guardian of a Hindoo minor is competent to carry on an ancestral trade on behalf of the minor. (See *Petum Doss vs. Ram Doss*, Taylor, 279; *Ramlal Thakursidas vs. Lakhmichand*, 1 A. J. li, lxii, lxxi; *Johurra Bibee vs. Sreegopal Misser*, 1 Cal., 470.) Consequently, the contention raised in this case that the infant appellant is not liable to any extent for the debt in question, is not well founded. On the other hand, it seems to us only reasonable, as well as in accordance with legal principle, that a minor, on whose behalf an ancestral business is carried on, ought not to be held personally liable for the debts incurred in that business. There must be some defined limit to the liability. The limit apparently laid down by Mr. Justice PHERSON is, that all the ancestral property is to be available to meet the liability. But there may be instances in which this limit would be found manifestly inadequate and unsuited to reach the result in the case. For example, a petty trade in the time of an ancestor might expand after his death into a large flourishing business in the hands of a manager for infants. Debts arising out of that business would naturally become proportionately large, and it would seem unreasonable to hold that such debts are recoverable from ancestral property only. On the other hand, if the trade might not prosper; and in this case the minor ought not to be liable to account for trade losses, out of any property connected with the assets of the business, which he has not received from his ancestor.

In the case of a minor being admitted into partnership by the ordinary way, section 247 of the Contract Act (IX of 1872) provides, that for any obligation of the firm the share of the property of the firm is alone liable. We think that the principle of the infant's liability, which has been adopted by the law in the case of a minor being admitted by contract into partnership business, ought to be adopted in such a case as the

In principle, there ought not to be any difference between the nature of the liability of an infant admitted by contract into a partnership business, and that of one on whose behalf an ancestral trade is carried on by a manager.

The elder brother Nobo Kisto has not appealed against Mr. Justice MACPHERSON's order, nor, on the other hand, have the plaintiffs appealed upon the ground that Nobo Kisto should have been made personally liable in the ordinary way. We ought not, under ordinary circumstances, to make a decree which would have the effect of altering his liability, when neither he on the one hand, nor the plaintiffs on the other, have appealed against the decree in the Court below. But under section 337 of the Code of Civil Procedure, Act VIII of 1859, we are empowered, in a case like the present, to draw up what would be a fair decree as regards both defendants. We propose, therefore, to make an order, unless the defendants admit partnership assets, sufficient for payment of the debt, there should be the usual decree for an amount of the partnership property, and a direction that the debts be paid out of that property.

It will be the duty of the plaintiffs to serve Nobo Kisto with a copy of this judgment; and if, within three weeks from the date of Nobo Kisto's receiving a copy of this judgment, neither the plaintiffs nor Nobo Kisto make any application to alter the terms of the proposed decree, the decree will be drawn up accordingly; either party will be at liberty to apply within that time. The minor defendant is entitled to the costs of the appeal.

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*Judgment.*

GARTH, C.J.

## [CIVIL APPELLATE JURISDICTION.]

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June 5.

MOBARUK SHAHA FAKEER AND ANOTHER . . . PLAINT

AND

SHEIKH TOOFANEE AND OTHERS . . . . . DEFEND

*Public Road—Ownership of site of road—Adjoining owners—Presumption of Ownership.*

Where the land along a path, which at one time formed a path but is no longer used or required as such, belongs on one side to one party and on the other to another, and no evidence is offered by either of the parties as to the site of the road being his property, the presumption is that it belongs to both the adjoining proprietors one and half to the other, up to the middle of the road.

**A**PPEAL under section 15 of the Letters Patent from a judgment passed by Mr. Justice PRINSEP, affirming that of the Subordinate Judge of Mymensingh, which reversed a decree of the District Judge of Jamalpore. The judgment of the learned Judge follows:—

"The plaintiff in this case sued to recover possession of a strip of land, which formerly used to be occupied by a path, which he had ploughed up, and from which he was dispossessed some time ago by the defendants. He claims this land as belonging to his property. In the first Court, the Munsiff divided this strip of land as a pathway between the plaintiffs and defendants, but the lower Court reversed that decision, holding that there was no reliable evidence that the pathway existed on the plaintiffs' land.

"In special appeal, it is contended that the decision of the lower Court proceeded on the proper principle, and in support of this a passage has been quoted from Addison on Torts, page 272. It appears, however, that this is inapplicable in the present case, where the plaintiff claimed the land as wholly belonging to his property, the defendant, on the other hand, claiming it as his. The fact that it may have been used as a pathway does not necessarily raise any presumption in this country, that it formed a boundary between adjacent properties, as was common to both, and this is shewn by the way both parties acted in this case in the Court of First Instance.

'On those grounds it appears to me that the decision of the Subordinate Judge must be maintained in Special Appeal. The appeal is dismissed, but without costs, as the respondent does not appear.'

Plaintiff appealed under section 15 of the Letters Patent.

*Baboo Rajendronath Bose*, for the Appellant.

The Respondent did not appear.

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MOBARUK  
SHAH  
FARUK  
v.  
SHAIKH  
TOOFANEE.  
Judgment.

The judgment of the High Court (1), was delivered by

GARTH, C.J.:

GARTH, C.J.

I think that there has been some misapprehension in this as to the actual circumstances under which the plaintiffs' suit was made.

The suit was brought to recover a portion of the site of an road, which had been used by the public for a considerable time previously to the year 1279, and which road, during all that time, formed the boundary between the land of the plaintiffs and the land of the defendants. In the year 1279, the Deputy Magistrate changed the line of the road altogether, so that the road in question was no longer used or required as a road: whereupon the plaintiffs took possession of that half of it which lay on their side of the road, and cultivated it for a time by their *burgodars*; but then, it seems, the defendants carried off the trees thus grown by the plaintiffs' *burgodars*, and thus forcibly dispossessed the plaintiffs; whereupon this suit was brought.

The Moonsiff decided in favour of the plaintiffs, upon the ground that as the old road lay between the two properties, and as no evidence was given on either side as to the site of the road being the property of either party, it must be presumed to belong to the adjoining proprietors, half to one and half to the other, up to the middle of the road. The Subordinate Judge, on appeal, considered that the Moonsiff was wrong. He held, as we understand him, that although the defendants might have taken forcible possession of the whole site of the road, and although they were unable at the trial to prove any title to it, the plaintiffs could not succeed in this suit as against the defendants without proving not only previous possession, but an actual title to the soil of the

(1) GARTH C.J., and McDONELL, J.

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 MOBARUK  
 SHAHA  
 FAKEEH  
 v.  
 SHRIKH  
 TOOFANEE.  
*Judgment.*  
 GAETH, C.J.

road ; and that the Moonsiff was not justified in acting upon a legal presumption which formed the ground of his judgment. On special appeal, the learned Judge of this Court thought the Subordinate Judge was right. He seems to have concluded that the plaintiff was claiming the whole site of the old road belonging to his property, and that, as the defendants also claimed the whole site as theirs, no presumption would necessarily arise in this country, that the road was the boundary between the properties or was common to both.

It is in this respect that we think the learned Judge of this Court quite correctly apprehend the facts. Upon reference to the judgments of the lower Courts, it seems clear to us that the plaintiff were not claiming the whole site of the road ; they were claiming the eastern half, which adjoined their land, and a less quantity of it than the half of the road which the Moonsiff awarded them, because the Subordinate Judge said the Moonsiff has certainly erred. In the first place, he has awarded a greater area than was claimed by the plaintiff, and upon a view that the boundary was inaccurate. In this respect the judgment is not warranted."

Then again the Moonsiff finds, not as a matter of presumption but as a fact, that the road lay between the lands of the plaintiff and of the defendants ; and the Subordinate Judge accepted this finding, and deals with the case upon that basis. He says the Moonsiff "has jumped to the conclusion that, since the plaintiff on both sides proves that the pathway existed on the land which defined the land of both parties, the defendants cannot claim the land without proof of their title, &c."

We, therefore, take the facts to be from the judgment of the lower Courts, that the old road did run between the plaintiff's properties ; that the plaintiffs sought to recover only a portion of it which adjoined their field ; that no evidence was given on either side as to the site of the road being the property of either party ; that the plaintiffs took possession in the first instance of the portion which they now claim ; and that the defendants dispossessed them of it. Upon these facts, we consider the Moonsiff was perfectly right in applying to this case the well-known and very useful presumption of law upon which

are not aware of any local or national law in this country prevents that presumption being made applicable to instances like the present.

And, in many cases, where little or no evidence of actual possession or title can be procured, it would be almost impossible to administer justice without having recourse to legal fictions of this nature. In fact, this very case affords a illustration of that principle. Here, no evidence was given on either side, as to the title or actual ownership of the property in question. From the fact of its being used as a road, and that it was so used, neither party had exercised any acts of dominion over it; and therefore, in the absence of any prescription or rule of law, the Court must needs have decided in favour of the stronger party. Might in such a case would confer right; and the party, who, by force and violence, could dispossess himself of the soil of the abandoned road, could successfully maintain it, according to the view of the Appellate Court, that on all comers, till some one had proved a better title to it than himself.

It is obvious that such a state of things would lead to lawless and mischievous consequences. The rule adopted by the Moonsiff is a just and reasonable one, and is always recognized in England. (See 1 Taylor on Evidence, p. 121, sec. 120; Roscoe on Evidence, p. 610, and cases there cited.) It is founded upon the position that when a road has been for many years the way between two properties, and there is no evidence, that either of either property gave up the whole of the land for it, it must be presumed that each party was to sacrifice one-half of the site, for the convenience and benefit of the public.

It is, therefore, the judgment of the Moonsiff that the judgment must be affirmed to the extent of the area which the defendants claimed in their plaint. He had obviously no right to award the plaintiffs a larger area than they claimed. The judgment must be confined to a piece of land, 25 cubits in length, 10 cubits in breadth, and about 1 cowrie in area, forming a portion of the parcel called Banakur, described in the plaint, and within the boundaries which are specified in the

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schedule. The judgment of both Appellate Courts was reversed; and the plaintiffs will have their costs in those cases as well as of this appeal.

[CIVIL APPELLATE JURISDICTION.]

May 16.

HURRY PROSAUD CHOWDHRY . . . . . PLAINTIFF  
AND  
GOPAL DASS DUTT AND OTHERS . . . . . DEFENDANT

*Suit for possession—Arrears of Rent—Limitation—Talook—Under  
—Chuckdari tenures.*

A, the owner of a talook which was sold for arrears of rent and purchased by the Government, held chuckdari tenures in the talook which were not cancelled by the Government after A got a lease of the talook from the Government in ijara from 1866, and in the latter year, B, who had bought the Government in the talook in 1861, attempted to take possession of the talook claimed to hold by virtue of his chuckdari tenures, and a suit was brought in 1874, by B, for possession of the land was dismissed. In 1876, B sued A for the rents of the chuckdari tenures for the years 1272 to 1279: *Held*, that the suit was barred by limitation.

*Mussamut Ranees Surnomoyes vs. Shooshee Mookhee Bura* Moore's Ind. Ap., 244; 2 B. L. R., 10 P. C., 11 W. R., 5 P. C.; *dyal Pramanick vs. Radha Kissen Debi*, 8 B. L. R., 63; *Chunder Roy vs. Khajah Asanoollah*, 16 W. R., 79; *Mohesh Chukladar vs. Gunga Moni Dossi*, 18 W. R., 39; *Watson vs. Chunder Mookerjee*, 1 L. R., 3 Cal., 13; considered and explained.

**REGULAR APPEAL** from an order passed by the Subordinate Judge of the 24-Pergunnahs, dismissing the suit.

This was a suit to recover the arrears of rent for two years and three months, namely, from 1272 to Aesar 1279, in the talook tenures, for the rent of which the suit has been brought, and within a talook which originally belonged to the defendant. In the year 1838, this talook was sold for arrears of rent and purchased by the Collector on behalf of the Government. From 1838 to 1840 it was under the direct control of the Government Officers. In 1841, the defendants took a farming lease

name of one Bissonath Dey. In 1846, that lease was re-  
 d for a term of twenty years, and thus defendants held the  
 k in ijara up to 1866. In 1861, the Government sold its  
 s in the talook to the father of the plaintiff. On the expiry  
 e defendant's ijara in 1866, the plaintiff attempted to take  
 sion of the land, but was opposed by the defendants who  
 sd that they held under-tenures in the talook, called Chucks.  
 174, plaintiff brought a suit for possession, which was dis-  
 d on the grounds that the defendant held these *chuckdari*  
 es in the talook at the time of the revenue sale in 1838, and,  
 e Government had not exercised its right of putting an  
 e them, the suit was barred by limitation. Plaintiff then  
 at the present suit on the 7th of September 1876 (23rd  
 to 1283) for arrears of rent of the *chuckdari* tenures from  
 to Assar 1279. The Subordinate Judge dismissed the  
 s barred by limitation, holding the case of *Mussamut Rane*  
*oyee vs. Shooshee Mokhee Burmonia*, 10 Moore's Ind. Ap.,  
 3 B. L. R., 10 P. C., 11 W. R., 5 P. C. to be inapplicable.  
 Plaintiff appealed.

Two Nil Madhub Bose, and Bhowany Churn Dutt, for  
 ant.

Two Radhica Churn Mitter, and Omesh Chunder Bannerjee,  
 pondent.

Judgment of the Court (1) was delivered by

C. J. :—

only question in this appeal is that of limitation ; and, in  
 to the proper solution of that question, having regard to the  
 ties to which our attention has been called, it is necessary  
 to the facts with some precision.

suit is brought to recover arrears of rent of certain  
 ri tenures from the year 1272 to 1279.

tenures are within the limits of Talook Kasinugger, which  
 ly belonged to the defendants' ancestors ; but as they  
 to pay the Government revenue, the talook was sold in the  
 1838, under Regulation XI of 1822, and purchased by

(1) GARTH, C.J.

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 PROBAUD  
 CROWDERY  
 G.  
 GOPAL DASS  
 DUTT.

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GARTH, C.J.



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the Government. In 1841 the defendants took a farming lease of it for five years in the name of one Bissonath Dey. In 1846, that lease was renewed for another twenty years, so that the defendants held the talook in ijara up to 1866. Meanwhile in 1850 the Government sold its proprietary right in the talook to the plaintiff's father, who afterwards died, leaving the plaintiff his heir; on the expiration of the ijara lease in 1866, the plaintiff endeavored to take khas possession of the entire talook from the defendants.

The defendants, however, set up certain chuckdari tenures extending over a large portion of the lands of the talook; whereupon the plaintiff, in the year 1874, brought a suit to recover possession of those lands. The defendant pleaded their chuckdari rights, and the District Judge, though he decided the question of those rights against the defendants, decreed the suit in their favor on the plea of limitation. On appeal, however, the High Court found against the plaintiff upon both points; considering that the evidence established the fact of the existence of the chuckdari tenures, it having been proved satisfactorily before the purchase of the Government rights by the plaintiff's father, the defendants had paid rent for those tenures to the Government, for which they produced receipts signed by the Collector. The effect of this finding was, of course, that the plaintiff was not entitled to dispossess the defendant of the lands in question; and that the defendants were held to be tenants of the plaintiff of those lands. The plaintiffs then asked leave of this Court to appeal to the Privy Council, which was refused; but afterwards, upon a direct application to the Privy Council, they obtained leave, and the case is now pending in that Court.

Meanwhile, upon the basis of the judgment of the High Court, the plaintiff brought this present suit against the defendants to recover the back rents of the chuckdari tenures from the year 1866 to 1872. It is admitted that the last rent thus due accrued due in 1872, more than three years before this suit was brought in 1876; but then it is said that the principle of the case *Ranee Surnomoyee*, decided by the Privy Council and reported in 11 W. R., p. 5 (P. C. Rulings), applies here; and that the cause of suits for these rents did not accrue to the plaintiff until the High Court delivered their judgment in the first

in the year 1876, confirming the existence of the chuckdari mares.

Our attention has been called by Mr. Bose to several cases in this Court, to which the ruling of the Privy Council has been applied; and it has been argued that, although the facts of this case may not quite resemble those of the case of *Ranee Surnomoyee*, this Court has extended the principle of that case so as to make it applicable to the present. The Subordinate Judge has held that the principle of that case is not applicable to the present; and we quite agree with him. In *Surnomoyee's* case a putni was sold for arrears of rent, under Act VIII of 1819. This sale was afterwards set aside for irregularity; and the putnidar was restored to possession. The zemindar then sued the putnidar to pay the back rents; and the putnidar pleaded that the suit was barred. The High Court here considered that it was so; but the Privy Council held otherwise; because, until the putnidar had recovered possession of the putni, the zemindar could not possibly sue him for the rent. In fact, no rent became due as long as the putnidar was ousted of his rights; but it was only equitable that, when those rights were restored to him, he should be put in them only subject to the obligation to pay the back rents to the zemindar.

Again, in the case of *Dindayal Paramanick vs. Radha Kishori*, decided by COUCH, C.J., and Justice JACKSON in this Court, (L.R., 537,) the plaintiffs sued the defendant in the year 1872 to recover the rent due for the year 1871, and to eject him for non-payment. The litigation lasted till 1876, when the plaintiff obtained a decree for the rent, and also for ejecting the defendant if the rent was not paid within 15 days. It depended solely upon the defendant himself whether he paid the rent or not; if he did not, his tenancy, in the opinion of the court, would have ceased, as from the time when the suit was brought; if he did, then the payment had the effect of restoring the tenancy. Under these circumstances, the landlord sued in 1872 for the rent of 1872, and it was held that he was not entitled, because until the defendant paid the rent, and so restored to himself the tenancy, the plaintiff had no cause of action for the rent.

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GARTHE, C.J.

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In the case of *Bahān Chunder Roy vs. Khaja Assanoolah*, 16 W. R., 79, decided by Mr. Justice JACKSON and Mr. Justice MOOKERJEE, it does not appear what the facts were, but from the language of the learned Judges they certainly seemed to consider that the case came strictly within the principle laid down by the Privy Council.

In *Mohesh Chunder Chackladar vs. Ganga Moni Dossi*, 18 W. R., p. 39, decided by KEMP and GLOVER, J.J., we certainly have some difficulty in seeing how the Privy Council decision could possibly have been made applicable; but the facts of that case are so totally dissimilar from those of the present, that we do not feel at all bound by that judgment.

Most of these authorities are carefully considered by Mr. Justice MARKBY and Mr. Justice MITTAR in the late case of *Water and Co. vs. Dheindra Chunder Mookerjee*, I. L. R., 3 Cal., p. 11, and we entirely agree with the view which the learned Judges there take of the judgment of the Privy Council.

That judgment, properly understood, is, in our opinion, wholly inapplicable to a case like the present.

Here, the plaintiff, whose ancestor purchased the right of Government in 1860, ought to have known, when the defendant's ijara came to an end in 1866, what his true position was against the defendants. The defendants set up against him the chackdari tenures, and, if the plaintiff had made proper enquiry, he might have ascertained whether those tenures really existed. But he chose to ignore them, and to sue the defendants (improperly as it has turned out) for khas possession of the talook, and it is not because he has made a mistake, and by that mistake put the defendants to the cost and inconvenience of a long litigation, that he has a right now to claim immunity from the provisions of the Limitation Act.

If that were so, any man, who mistakes his proper rights and remedies, might, with equal justice, claim exemption from the provisions.

Take the ordinary case of a landlord giving his ryot notice to quit, and at the expiration of that notice bringing a suit to eject him. The ryot sets up a right of occupancy; and the landlord, after a litigation extending over four or five years,

eventually defeated upon that ground. Could the landlord, under such circumstances, sue to recover rent from the ryot, which accrued due four years previously, and contend that he was not bound by those, because he could not pursue his claim for rent and his claim for ejectment at the same time? In our opinion, certainly not. Such a case would be entirely different from that decided by the Privy Council. If a landlord could recover back rents under such circumstances, he would be taking advantage of his own mistake, to relieve himself from the law of limitation.

In this case the plaintiff ought to have known in 1866 what his position was as against the defendants. Instead of treating them as tenants, and claiming from them the rents, which they could probably have paid, he brought a suit against them for khas possession. Having failed in that suit, he is now trying to recover the rents as from 1866. We think he is clearly barred.

The appeal will be dismissed with costs, including the costs of the application for postponement of the hearing of the appeal.

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[CIVIL APPELLATE JURISDICTION.]

OTAP CHUNDER DASS . . . . . PLAINTIFF;

May 16.

AND

OUR CHUNDER ROY AND OTHERS . . . . . DEFENDANTS.

*Principal and Surety—Discharge of Surety—Granting further time to the principal debtor—Advance of Interest—Contract Act, IX of 1872, section 135.*

Where A owes a debt to B, for the payment of which C is surety, the question, whether the receipt of an advance of interest by B from A is in effect a contract to give further time to A to pay the debt, is a mixed question of law and fact. As a general rule, the acceptance of interest in advance by the creditor does operate as a giving of time to the principal debtor, and consequently as a discharge to the surety.

*Held*, in this case, that, though the creditor by taking an advance of interest did bind himself to give further time to the principal debtor, yet the surety still remained liable, as he had assented to the arrangement.

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Punchanan Ghose vs. Daly, 15 B. L. R., 338; *Dwarkanath Birch*, id.; and *Kali Prosenno Roy vs. Umbica Churn Bose*, 11 417, cited.

REGULAR APPEAL from a decree of the Subordinate of Dacca.

On the 17th of September 1875, N. P. Pogose drew two exchange, each for the sum of Rs. 10,000, payable nine after date, in favour of Bhoobun Mohun Dass, and accep Gour Chunder Roy. These bills were indorsed over to Chunder Dass, by Bhoobun Mohun Dass, in satisfaction o due by N. P. Pogose to Protap Chunder Dass. The bills were dishonored at maturity, due notice of which was given to the holder to the drawer, and the money demanded from him on the 1st of February 1876, Protap Chunder Dass, the holder of the bills, accepted payment of Rs. 1,860, interest on Rs. 20,000 amount of the Hoondies, for 93 days from the due date, namely, the 19th of December 1875. In consequence of this payment, Protap Chunder forbore to sue for the money. It was understood by all parties that Bhoobun Mohun and Gour Chunder were merely sureties for N. P. Pogose, the principal debtor. The present suit was instituted by Protap Chunder on the 1st of July 1876, against Gour Chunder Roy, the acceptor, N. P. Pogose, the drawer, and Bhoobun Mohun Dass, the indorser of the bills. The defence of Gour Chunder was, that the bills were not due until the 1st of February 1876, and that the future interest on the 1st of February was without his knowledge or consent, and discharged him from his liability as surety. Bhoobun Mohun's defence was, that, besides the taking of the bills, no notice of dishonor was given to him. The Subordinate Judge dismissed the suit as against Bhoobun Mohun and Gour Chunder, and gave a decree against N. P. Pogose alone for the amount claimed. The plaintiff appealed against the judgment of the lower Court, on the question of Gour Chunder's liability.

Paul, (Advocate-General,) and *Evans*, for the Appellants *Lallit Chunder Sen* with them.

Branson, for the Respondent. Baboo *Bhoobun Mohun Dass* and Baboo *Lall Mohun Dass*, for the Respondent.

The judgment of the Court (1) was delivered by

JARTH, C.J. :—

This is a suit brought by the plaintiff, Protap Chunder Dass, to recover from the defendants the sum of Rs. 20,740 for principal and interest due upon two hoonadies, each dated the 4th September 1875, payable 90 days after date, drawn by Mr. P. Ghose, the defendant No. 2, in favour of the defendant No. 3, and accepted by Gour Chunder Roy, the defendant No. 1. The lower court has held that the last-named defendant is not liable, and the only question in this appeal is, whether he is liable or not.

It is an admitted fact in the case, that the only person, for whose benefit these hoonadies were drawn and negotiated, is the plaintiff, the defendant No. 2, and that the other defendants were sureties; and the defence, which is set up by Gour Chunder, is, that, after the bills became due, the plaintiff gave time to Mr. P. Ghose, the principal debtor, without his (the defendant's) consent, by accepting from him a sum of Rs. 1,860 by way of interest advance, and that this discharged the defendant No. 1 from liability. There is no doubt as to the fact of these advances for interest having been received, and the questions which we have to decide are :—First, whether the effect of those advances was to give time to the principal debtor; and, secondly, whether the defendant No. 1 was aware of and consented to those advances.

The first of these, having regard to the authorities upon the subject, appears to be a mixed question of law and fact. It has been held, both here and in England, that under certain circumstances the receipt of advance interest by the creditor does not constitute a binding contract by him with the principal debtor, not even if he does so during the time for which the advance interest is due (see the cases of *Punchanon Ghose vs. Daly and another*, *Dwarkanauth Mitter vs. Birch and another*, decided by Mr. Justice PHEAR in this Court, 15 B. L. R., 338; and the case of *Rayner and others vs. Fussey*, 28 L. J. Exch., 132); but the current of authorities in England (which will be found stated in the notes to *Rees vs. Barrington*, 2 White and Carter's L. Ca., 992), and the case of *Kali Prosonno Roy vs. Umbica Churn Bose*, decided in this Court by COUCH, C.J.,

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and Mr. Justice MARKBY, 18 W. R., 417, in which leading authorities are reviewed, clearly show that, as a rule, the acceptance of interest in advance by the creditor operates as a giving of time to the principal debtor, and comes only as a discharge to the surety.

In this case, we think it clear that the arrangement with *to batta*, or advance interest, operated to prevent the plaintiff suing Mr. Pogose, during the time for which the advance was made. The witness Monohur Lala, who made the arrangement and who is called by the defendant No. 1, distinctly states his avowed and express object, in paying the advance, was to obtain further time for payment of the bills. Mr. Pogose returned to Dacca. The only object and consideration on Mr. Pogose's part was to stay the plaintiff from taking proceedings; and if proceedings had been taken in the teeth of the arrangement, any Court ought undoubtedly to have restrained the plaintiff from prosecuting his suit. That being so, the position of the defendant No. 1 was undoubtedly changed. He had a right, at any time after the hoondies became due, to initiate proceedings being at once taken against Mr. Pogose, to annul the binding arrangement between the plaintiff and Mr. Pogose, which prevented the former from suing the latter, despite the defendant No. 1 of that right. The taking of advance interest did, therefore, discharge the defendant No. 1 unless he consented to the transaction.

This brings us to the second, and as we consider, the first question, viz., did the defendant No. 1 know of, and consent to, the advance interest being taken. This point has been argued on both sides, and, having carefully considered the evidence, we are of opinion that he did consent to it. We are of this conclusion, in a great measure, by the evidence of Monohur Lala, who, as we have already observed, was called by the plaintiff himself, and whose evidence the Subordinate Judge believes. This witness was the Mohurrir of Mr. Pogose, and it was a part of his duty to make arrangements with regard to the hoondies and other bills. He says, that, after these hoondies had been taken, the plaintiff told him (as representing Mr. Pogose, who was absent from Dacca), that the money must either be paid

hoondies renewed. Upon that, he went to the defendant Gour Chunder and informed him that the hoondies had become due, and that he would have to renew them once more. The defendant said he would not renew them, whereupon the witness said to him, "Mr. Pogose is not here; let him come, and we will get your hoondies discharged, either by payment of the money or giving some fresh hoondies. I will make a settlement with the plaintiff either by payment of interest in advance, or in some other way as long as Mr. Pogose is not coming, so that he may not tease you for that time." To this the defendant answered; "Get me discharged as soon as possible." About eight or ten days after this conversation Monohur Lala paid the plaintiff Rs. 1,860, as interest for three months from the time when the hoondies became due. The bills had then been due five or six weeks. Soon after this, the defendant wrote to the witness to ask what settlement had been made; and witness wrote reply informing him of the arrangement. No objection was then made by the defendant to time being thus given, either when the witness informed him what he proposed to do, nor when he wrote to him to say what he had done. It is perfectly plain, from the other evidence in the case, that the defendant was much annoyed at being pressed by the plaintiff for the money, and anxious that some arrangement should be made for preventing this annoyance until Mr. Pogose returned to Dacca, when it was expected that the bills would either be paid or renewed. And it is also perfectly plain that, after he knew what arrangement Monohur Lala had made, the defendant still considered himself liable to pay the bills, and endeavoured to induce Mr. Pogose, when he came to Dacca, to give him some security as a protection against his liability.

It appears clear, therefore, from evidence called by the defendant himself, that after the bills became due he was pressed for payment by the plaintiff; that Mr. Pogose's Mohurrir told him that he intended to get time, by paying interest in advance, till Mr. Pogose returned, when he would get the bills paid or in some way discharged; and, so far from objecting to this, the defendant said "Well get me discharged as soon as you can;" that soon after the arrangement was made, he was informed of the fact, without making any objection, and that he afterwards virtually admitted his liability. The

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only part of this evidence which the defendant himself directly denies, is that he received a letter from Monohur Lala; but he never denies having received information that the arrangement as regards the interest had been made. Thus, from the evidence of the defendant there is strong ground for believing that he not only knew of but approved that arrangement; but if the evidence of the plaintiff and his witnesses is to be believed, the defendant Gour Chunder not only gave a constructive assent to the payment of the *batta*, but himself requested the plaintiff to take it; and on another occasion sent for one of the plaintiff's servants, and said to him, "Why does not the plaintiff take the *batta*? Mr. Pogose will return in one and a half month, and then I will get the money realized. For the present, tell the plaintiff to take the *batta* for three months." It was obviously for the benefit of all the defendants that time should be obtained for a settlement of the case until Mr. Pogose returned. The evidence of the plaintiff and his witnesses is consistent in all material respects with that of Monohur Lala, and we see no good reason why it should not be believed.

The defendant's counsel urged upon us very strongly that the plaintiff's case must be false, on account of the contradictory statements made first in the plaint, and then in the petition of the 19th of July, four days afterwards. But when these statements were examined, and the actual truth ascertained, the explanation of them is very simple. In the plaint it was stated, perfectly true, that defendant No. 2 was the person who paid the interest in advance. Then, it appears that the plaintiff was told by one of his servants that the *khata* book, in which the transaction was entered, stated the interest to have been paid by the defendants Nos. 1 and 2; and the plaintiff consequently filed the petition of the 19th of July to amend the plaint in that respect. When, however, the *khata* book came to be examined at the trial, it was found that the interest was in fact entered as having been paid by the defendant No. 1, Gour Chunder. It is true that the entry was not strictly correct, because, admittedly, the interest was paid by Monohur Lala for defendant No. 2, Mr. Pogose. But on looking through the entries in the *khata*, it seems customary on all occasions to enter payments, either of principal or interest, as having been made by the acceptor of the *hoondies*; and the reason why the petition

is very plain. It was not suggested, either in the Court or in this Court, that the entry in the *khata* book was a *ry*; and Mr. Branson very properly admitted that he had no *id* for saying that it was so.

On these reasons we are of opinion that the defendant No. 1 did not assent and consent to the payment of the interest in advance, and the defendant No. 1 is consequently liable, conjointly with the defendant No. 2, for the amount of the bills and interest at twelve per cent. during the time the suit was pending in the lower Court, the costs in this Court and in the Court below, and with six per cent interest on the total amount from the date of the lower Court's decree until payment.

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[CIVIL APPELLATE JURISDICTION.]

SECRETARY OF STATE FOR INDIA IN COUNCIL,
PETITIONER.

June 17.

Suits—Payment of Stamp Fees—Amendment of Decree—Application to amend by person not a party to suit—Party to suit.

A instituted a suit in *forma pauperis* against B, to which the Government was not a party. The claim was decreed in the Court of First Instance, but this decision was reversed by the High Court in regular appeal, and the plaintiff's suit dismissed. The decree of the High Court did not contain any order as to the payment of the stamp fees, and the Government applied to have the decree amended in that respect: Held, that the application must be refused on the ground that the Government, not being a party to the suit, had no right to be heard in the matter.

It was a petition by the Secretary of State for India in Council, for the amendment of a decree passed by the High Court regarding a suit instituted in *forma pauperis*. The petition is in the following terms:—

Noweth,—That Kamar Ali Daroga and Hamid Ali instituted a suit in *forma pauperis* against Sushti Churn Chowdhry and others in the Court of the Subordinate Judge of Chittagong, and the suit at Rs. 5,677-12-5-5.

That the said suit was decreed partially by the said Subordinate Judge on the 23rd May 1876, the decree providing that

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out of the total amount due to Government for stamp duty the plaintiffs were to pay Rs. 224-8-0, and the defendants were to pay Rs. 80-8-0.

"That thereupon the defendants appealed to this Honorable Court in Regular Appeal No. 235 of 1877, and a Division Bench consisting of their Lordships Mr. Justice KEMP and Mr. Justice MORRIS, on the 28th January 1878, decreed the said appeal and reversed the decree of the lower Court, and dismissed the plaintiffs' suit *in toto*.

"That the decree of this Honorable Court does not contain any order as to the amount due to Government for stamp fee.

"The petitioners now pray that your Lordships will be pleased to order that the decree be amended by adding an order to the effect that the amount of Rs. 305, due to Government for stamp duty, be paid by the plaintiffs, or to pass such order as to your Lordships may seem meet and proper."

The decision of the High Court (1) was delivered by

GARTH, C.J. GARTH, C.J. :—

We think that this application should be refused, upon the ground that Government is no party to the suit, and has no right to be heard in such a matter.

It appears that, in the suit in which the plaintiffs were allowed to sue *in forma pauperis*, Mr. Justice KEMP and Mr. Justice MORRIS gave a judgment in the month of January last, when deciding, as they apparently should have done, which of the parties was to pay the stamp fee on the plaint. It being no fault of either of the parties to the suit to apply for a reversal of the judgment, the Government pleader applies to us, on behalf of the Government, to have the decree, which was made five months ago, amended by a statement as to which of the parties should pay the Court fee. Without going at all into the merits of the application, we have no hesitation in deciding that the Government pleader has no right to appear at all in this case.

No doubt the Court is always bound to see, so far as it can, that the interests of Government, as regards the stamps, &c.

(1) GARTH, C.J., and McDONNELL, J.

properly protected; and it is very possible that an accidental omission may have been made in this particular case. But that would not justify an application to the Court on behalf of Government in a civil suit.

We have asked the Government to give us any precedent, in which Government, not being a party to the proceedings, has been allowed to appear in a matter of this kind, merely for the purpose of rectifying some error affecting the revenue. But he is unable to furnish us with any such precedent, and very candidly tells us that he is not aware of any application of this nature having been made before. Most certainly, if such applications were allowed to be made, they would give rise to no small amount of inconvenience and expense; because if the Government pleader has a right to appear on this occasion, it would seem to follow that in every case in which Government might happen to be interested, whether as regards the amount of stamp fee, or the admissibility of an unstamped document, or the like, the Government pleader could equally have a right to appear, not as a party to the suit, but merely for the purpose of protecting the revenue. We think it clear that such a practice ought not to be allowed, and that the application must be refused.

1878

THE

SECRETARY
OF STATE
FOR INDIA IN
COUNCIL.*Judgment.*

GARTH, C.J.

[CIVIL APPELLATE JURISDICTION.]

1878
June 5.

ANNODA CHURN ROY AND OTHERS . . . DEFEND

AND

KALI CUMAR ROY AND OTHERS PLAINT

*Tenant holding under a joint lease—Payment of rent in separate
Suit for a separate share of Rent.*

Where a tenant has taken a lease of certain land from several sharers jointly, and has continued to pay the rent in its entirety to the co-sharers; then, so long as the title of the co-sharers is joint, the assignee of any one of them cannot bring a suit against the tenant for his separate share of the rent, even though he may make the other co-sharers defendants to the suit.

Sreenath Chunder Chowdhry vs. Mohesh Chunder Banerjee
C. L. R., 453, cited.

APPEAL under section 15 of the Letters Patent from the judgment passed by Mr. Justice AINSLIE.

The facts of the case are sufficiently set forth in the judgment of the High Court, and in the judgment appealed from, which is as follows:—

AINS LIE, J. AINS LIE, J:—

In the present case the plaintiff sued a person said to be his alleged co-sharers and his donor, the suit being for a share of the rent by the tenant. The tenant has answered that, provided the share is determined, he is willing to pay rent to the plaintiff; therefore, the question whether the plaintiff is entitled to sue for a fractional share of the rent previously paid to several persons jointly does not arise: it cannot be claimed by the co-sharer defendants, but only by the person affected by the rent, that is, the person who is to pay rents.

The first Court has, however, come to the conclusion that this judgment which will not lie, partly on the ground that the plaintiff claims a share of the rent, and partly because he had no business, in a recent attempt to obtain a definition of title as against his co-sharers. The High Court has confirmed the judgment of the first Court, though he does not give a decision upon that view of the law.

It appears to me that both the lower Courts are wrong. In a recent other suit, a person is entitled to raise questions of every kind

necessary to the determination of the claim that he puts forward, provided that he brings before the Court all parties in whose presence the question is to be determined. The objection to the attempt constantly made to obtain adjudication of title in suits founded on demands for rent, or in actions for damages, arises not from the nature of the suit generally, but from the frame of the particular suit and from a careful avoidance, by the person who wishes to get a declaration of title, of the names of all those against whom such declaration is to take effect: for some reason, plaintiffs think desirable to shirk bringing forward their real adversaries, and trust to the Court's misuse of section 73. However, in the present case, the plaintiff has openly come forward, and has brought in all the parties before whom his suit ought properly to be tried out. It is a *bond fide* suit to have it declared that he is entitled, as against the defendant, who is said to be a co-sharer who claims the whole of the property, to a half share of the rent of the tenant defendant, and, as against the tenant defendant, to a decree for rent to the extent of that half share. Thus, the judgment of the First Court must be set aside.

Then there remains the other question, whether the judgment of the Appellate Court ought not to be set aside, on the other grounds on which it is based, viz., "That the first step in this case is for the plaintiffs to prove that they obtained a deed from a person competent to grant the same, and that the deed was given sufficiently long ago to cover the period of three years for which the arrears are claimed," but "evidence on this point has not been adduced, and in its absence the suit cannot stand. It appears that evidence on the distinct points is necessary: first, that there has been a gift from a certain person to the plaintiff; secondly, that the person who made the gift was competent to make it; and, thirdly, that the date of the gift is antecedent to the accruing of the arrears of the years 1235, 1236, and 1237, or of one or more of them." Whether the Judge means that evidence on the whole of these points has not been adduced, or whether he is thinking only of one particular point of fact, it is impossible for me to say; but it is admitted that there is on the record some evidence which, if believed, may be sufficient to establish the gift and the competency of the giver. The moment the gift is established, the question whether, under that gift, the plaintiff is entitled to the rent of the three years claimed by him, or to the rent of any portion of those three years, will also successively be established. The case must go to the Judge, in order that he may try these three issues of fact on the evidence that is on the record."

The defendants appealed under section 15 of the Letters Patent.

Saboo Huri Mohun Chuckerbutty, for Appellants.

Saboo Kashi Kant Sen, for Respondents.

1878
 ANWODA
 CHURN ROY
 KALI CUMAR
 ROY.
 Judgment.
 AINSLIE, J.

1878

The judgment of the Court (1) was delivered by

ANNODA

CHURN ROY GARTH, C.J. :—

v.
KALI CUMAR
ROY.

Judgment.

GARTH, C.J.

This suit is brought to recover from the defendant N 8 annas share of the rent of a certain jote, which, as I say, formed the joint property of their father Guru D the defendant No. 3, and Pran Kisto Roy, the father of defendant No. 2. The plaintiff's case is, that an undivided share of this property has been conveyed to them by a gift; and they sue the defendant to enforce payment by their half share of the entire rent.

They have made defendants Nos. 2 and 3 parties to the suit, avowedly in order to obtain, as against them, an adjudication of their title to the 8 annas share of the rent; and in point of fact endeavouring to try the question of title between them and the defendants Nos. 2 and 3, under the guise of a rent suit against the defendant No. 1.

It is not suggested that defendant No. 1 was ever bound to pay his rent, in its entirety, to the persons who were made parties to receive it; but he is harassed with this suit, in order to try the alleged title of the plaintiffs to their share, as against the defendant Nos. 2 and 3, may be ascertained and established.

The learned Judge of this Court considers that such a course is not proper, but we are unable to agree with him. If *ijmali* land is let to a tenant at one entire rent, we think it clear, on principle and authority, that the rent is due in its entirety to the co-sharers, and that all are bound to sue for it, and any one co-sharer can sue to recover the amount of his share, whether the other co-sharers are made parties to the suit or not. Of course, if the land demised ceases to be *ijmali*, and one part of the divided area becomes the property of A, while the other becomes the property of B, it is necessary that an apportionment of the rent should take place; and then, in order to enforce such an apportionment, it would be quite proper, that either A or B should bring a suit against the tenant for so much of the rent as he considers his proper portion, making B or A, as the case may be, a party to the suit.

(1) GARTH, C.J., and McDONELL, J.

An illustration of this will be found in the case of *Sreenath Chunder Chowdhry vs. Mohesh Chunder Banerjee*, 1 C. L. R., 463.

But here there has been no division of the area of the property. The area is entire; the rent has always been paid by the tenant in its entirety; and the title of the co-sharers remains *in ali*. We think, therefore, that the decision of the Moonsiff is right; and that the judgment in Special Appeal must be reversed, and the plaintiff's suit dismissed with costs in both the parts.

1878
ANNODA
CHURN ROY
v.
KALI OUMAR
ROY.
Judgment.
GARTH, C.J.

[CIVIL APPELLATE JURISDICTION.]

ORDHAREE SAHOO AND OTHERS DEFENDANTS;

April 9.

AND

DEERA LALL SEAL AND OTHERS PLAINTIFFS.

Settlement—Successive Settlements with different Owners—Suit for Possession—Party to Suit—Government made a party to a suit—Act VIII of 1859, section 73.

Where a piece of land has been surveyed and settled, at one time as an accretion to the estate of A, and at another as an accretion to the estate of B; in a suit by A against B for possession of the land it is not, as a rule, necessary that the Government should be made a party.

Mahomed Israil vs. Wise, 21 W. R., 328, considered and explained.

SPECIAL APPEAL from a decree passed by the Judge of Nagulpore, reversing that of the Subordinate Judge of that district.

This was a suit for possession and mesne profits of a piece of land, which at one time had been covered by the Ganges. In 1848, while still under water, it had been surveyed by the Government as part of the plaintiff's revenue-paying estate. In 1862 it reappeared above the water, and was taken possession of by the plaintiff, with whom it remained till 1871, when they were ousted by the defendants. It appears that in 1868 the defendants had caused the disputed land to be measured as part of their estate, and it was settled with them by the Settlement Officer in 1868.

1878
 GIRDHAREE
 SAHOO
 v.
 HERRA LALL
 SEAL.
 Judgment.

The defendants objected that, as plaintiffs contested a settlement made by Government, it was necessary that Government should be made a party to the suit. It is on this point alone that the case is reported. The suit was dismissed in the Court of First Instance, but this decision was reversed on appeal. Defendant then brought this special appeal.

Baboo Mohesh Chunder Chowdhry, for Appellant.

Baboo Chunder Bose, for Respondent.

On the question of non-joinder the following judgments were delivered by the Court (1) :—

MARKBY, J. MARKBY, J. :—

The defendant, amongst other objections which I need not present notice, pleaded that, as plaintiffs contested a settlement made by Government, it was necessary to make Government a party to the suit. The first Court dismissed the suit upon the ground of limitation, and did not notice the objection as to Government being made a party to the suit. The second Court over-ruled the plea of limitation, and, holding that the plaintiff had proved a portion of the land in dispute to be part of his zemindary, gave him a decree accordingly. The objection as to Government being a party was taken in the lower Appellate Court and over-ruled. The same objection is now taken in special appeal, and it is contended that the suit should have been dismissed upon that ground, unless the plaintiffs can now induce Government to become a party to the suit.

It was considered convenient to dispose of this point first before entering upon the other questions raised by the appeal. In my opinion, the contention that the plaintiff was bound to make Government a party to this suit cannot be supported. The plaintiff prays for no relief against Government, and asks nothing from Government, and the only reason suggested to us why Government should be made a party is, that the defendant may in some way or other be relieved from what is called his engagement

(1) MARKBY and PRINCEP, J.J.

Government as to payment of revenue. Now it may be, if the plaintiff succeeds in this suit, and there has been no, the defendant will have a grievance. His estate, though that reduced, will remain burdened with an assessment calculated upon a larger area; but the Civil Court cannot redress this inconvenience. It is admitted that, for this purpose, the defendant have to apply to the Government. It is, of course, just to conceive, though it is very improbable, that the Civil, in adjusting the boundaries between two adjoining estates, so far reduce the value of one of them as to affect the yield of the revenue; but if so remote a contingency as this be considered as affecting the interests of Government, it would be necessary to make Government a party to every suit between adjoining proprietors as to their boundaries. This has never been the practice, and it would be most undesirable, in my opinion, to change it. It would involve Government in a mass of litigation without any corresponding advantage.

Great stress was laid upon a decision reported in 21 W. R., 328, in *Israil vs. Wise*, in which Sir RICHARD COUCH held that, in a suit for land brought by a person claiming to be the owner, against a person who had obtained a temporary settlement (in the document called a "lease") from Government, the Government should be a party to the suit. No question of that kind was brought to the Full Bench, and the point was not argued. I, therefore, take it that this is not the decision of the Full Bench, but of the Chief Justice alone. I do not at all mean to say that the decision is still entitled to very great respect, but I point this out, before us, it was argued that this point had been decided by the Full Bench. I have consulted the three learned Judges who concurred with the Chief Justice, and they inform me that they do not intend to express any opinion except upon the points in dispute. But the case itself is distinguishable. The Chief Justice, in his judgment at p. 330: "It appears to me that there has been an error in the proceedings, in holding that the Government is a proper party to the suit. The Government having given possession of the lands to another person, it was proper that it should have had an opportunity of showing that this had been properly done. If the Government were a party to the suit, the person who got

1878
GIRDHAREE
SAHOO
v.
HERRA LALL
SEAL.
Judgment.
MARKBY, J.

1878
GIRDHARAN
SAHOO
v.
HEERA LALL
SEAL.

Judgment.

MARKBY, J.

the lease from the Government might be freed from liability. Now, another suit will be necessary to finally decide matters between these parties, as the Government, being not a party to this suit, will not be bound by the decision in it." It is therefore, that Government had applied to be made a party to the suit. If Government had applied to be made a party to the suit it might possibly be then taken to have submitted to be bound by the decree in the suit, and it might be proper to make Government upon its own application a party to such a suit. This is obviously a totally different thing from saying that Government to which Government is not a party, and has never desired to be made a party, cannot be maintained. I do not think there is any authority which shows that it was necessary to make Government a party to the present suit, and, this objection failing, the appeal must be disposed of upon the merits.

PRINSEP, J. PRINSEP, J. :—

I am also of opinion that the suit was properly tried without making the Government a party to it, as it cannot be made a party in the words of section 73, Act VIII of 1859, that a person is entitled to or claims some share or interest in the subject-matter of the suit, or is likely to be affected by the result of the judgment of the Full Bench (21 W. R., 323), as delivered by RICHARD COUCH, the late Chief Justice, has been explained by the other Judges who comprised that Court, in the manner just stated by Mr. Justice MARKBY, and does not therefore stand in the

[CIVIL APPELLATE JURISDICTION.]

MUR PROSHAUD ROY AND OTHERS DEFENDANTS;
 AND
 ENAYET HOSSEIN PLAINTIFF.

1878
 April 29.

*Execution proceedings barred by limitation—Regular Suit to set aside
 Execution proceedings—Execution case struck off—Act XXIII of 1861,
 sec. 11—Estoppel—Decree against joint defendants—Appeal by one
 of several defendants against part of a Decree—Limitation.*

A having obtained an order for the reversal of certain execution proceedings instituted by B, on the ground that they were barred by limitation, and carried on fraudulently without his knowledge, B had that order set aside on appeal, on the ground that there was no execution case before the Court, in which such an order could be made. A then brought a regular suit to set aside the execution proceedings, when B objected that a regular suit would not lie under the provisions of section 11, Act XXIII of 1861: *Held*, that B was estopped from taking that objection in the present suit.

Where a decree for possession of certain property is made against three persons jointly, one of whom appeals against the decree only so far as it affects himself and not against the whole decree, and the decree does not relate to property in respect to which the defendants have a common interest and a common defence, so that an appeal by one would imperil the whole decree, then the fact of one defendant having appealed will not prevent limitation running, in favour of the others, against the execution of the decree.

SPECIAL APPEAL from a decree passed by the Judge of the Court of First Instance, affirming that of the Moonsiff of Sewa.

On the 29th of February 1868, the present defendants, in a suit against Muzhur Hossein, Enayet Hossein the present plaintiff and another, obtained a decree in the Court of First Instance for the possession of certain property. Muzhur Hossein appealed to the Judge and then to the High Court, where the decree was reversed as far as concerned the property in the hands of Muzhur Hossein. The date of the High Court's order was the 12th of April 1872. Application for execution was made in August 1872, and some steps for putting the present defendant in posses-

1878
HUR
PROSHAWD
ROY
v.
ENAYET
HOSSEIN.
Statement.

sion were taken on the 16th of December 1872, and the execution case was struck off the file.

On the 30th of May 1873, the present plaintiff, Enayet Hossein, objected to the execution proceedings, on the ground that they had been carried on without his knowledge, and that execution had become barred by limitation. He asserted also that he still held possession, and that there had been no *bond fide* proceedings to put the present defendants into possession. The Moonsiff refused to entertain the application. On appeal, the District Judge held that the whole proceedings were bad, as execution of the decree had been barred in August 1872. In special appeal, this order was reversed on the ground that there were no proceedings before the Moonsiff in May 1873, in which he could make an order. The objector, Enayet Hossein, now sues to have the execution proceedings of 1872 declared invalid and inoperative, on the ground that the decree was barred by limitation. The Court below concurred in granting the decree asked for. Defendants then specially appealed to the High Court.

Baboo *Aubinash Chunder Banerjee*, for Appellant.
Moonshee *Mahomed Yusoof*, for Respondent.

The judgment of the High Court (1) is as follows :—

The special appeal rests on the grounds that the question in issue is one relating to the execution of a decree and cannot be determined in a separate suit; and that the Judge of the Court below has erred in holding that execution of the decree was barred by limitation.

As to the first, it is sufficient to say that the plaintiff is certainly entitled to have his complaint enquired into either in one form of proceeding or the other. The enquiry was originally held by the District Judge as an Appellate Court, acting under the provisions of section 11, Act XXIII of 1861. On the objection of the Appellants, that enquiry was cancelled, on the ground that there was a proceeding pending before the Moonsiff that admitted of such enquiry being made. The same objection applies to any form of application which the plaintiffs can now make, or could at any time make after the execution suit was taken off the file as concluded.

(1) AINSLIE and CUNNINGHAM, J.J.

er the objection is a sound one or not is a question into we need not stop to enquire. The appellant took it and led in it, and it does not lie in his mouth to say the contrary. As between the parties to this suit, there has been an action that the plaintiff could not proceed under section 11, section 11 does not apply to the case there is no other law takes away the plaintiff's right of suit.

Other ground of appeal is equally unsound. The original was in form made against the three defendants collectively ; if them appealed, but this appeal was dismissed on the 23rd 1869. Muzhur Hossein, one of the appellants, preferred a special, but not against the whole decree so as to give the Appellate jurisdiction, under section 337, to reverse the decree alto-

His appeal only related to his own 10 pie share. As to the subject of dispute and the remaining defendants, the order of the 23rd May 1869 was final ; execution of the decree against them could not have been stayed in consequence of Hossein's appeal, and no question between them and the order was dependent on the result of Muzhur's appeal. It was that, though the decree was drawn up in the form of a single order, it did in fact incorporate in that order separate decrees against Muzhur and the others, and that it did not relate to property in which the defendants had such a common interest and a common defence, that the appeal by any one imperilled the whole. The reason for suspending the operation of the law of execution during the pendency of an appeal is, that it is manifestly unjust to force an execution of a decree, while there exists any question as to the rights of the decree-holder against the appellant ; the reason does not apply to such a case as this, in which there had been a final determination of rights between the decree-holder and the present plaintiff, which could not be re-opened by a special appeal of Muzhur Hossein. The decisions of the lower court are correct, and the appeal must be dismissed with

1878
HUR
PROSHAUD
ROY
v.
EMAYET
HOSSEIN.
Judgment.

[CIVIL APPELLATE JURISDICTION.]

1878
May 15.

RAM KANT CHUCKERBUTTY PLAINTIFF

AND

CHUNDER NARAIN DUTTA ROY DEFENDANT

Hindoo widow—Power of alienation given to widow by will—Pilgrimage—Alienation for expenses of Pilgrimage—Liability of Purchaser—Retention of Purchase-money.

Where a Hindoo, by will, directed that his widow should have power to sell his property for the purpose of defraying the expenses of a pilgrimage, a *bonâ fide* purchaser from the widow who, at the time of purchase, believed and had reason to believe, that the widow was going on a pilgrimage, and that the property was sold and the proceeds raised for that purpose, is not bound to give back the property in a suit of the reversioner, if there is any evidence that the widow really go on the pilgrimage.

Per GARTH, C.J.—In such a case, the purchase would be good if there were no evidence that the widow had gone on a pilgrimage.

APPEAL under section 15 of the Letters Patent from a decree passed by Mr. Justice BIRCH, reversing that of the Second Assistant Judge of Mymensingh, which reversed a decree of the Moonsiff of Niklee.

Ram Mohun Roy died, leaving surviving his widow Promessuree Dossee and two nephews (father's grandsons by daughter) Kamla Kant and Bisben Kant. By his will, dated the 6th of Chaitra 1272, Ram Mohun left his property to his wife for her power to sell 8 annas thereof, to pay the expenses of *aradhi* for her going on pilgrimage. The widow afterwards sold the 8 annas to the plaintiff Ram Kant Chuckerbutty, the deed of sale reciting that the property was sold for the purposes of defraying the expenses of a pilgrimage which the widow was about to make; and stated in evidence by one witness that he did go to the pilgrimage with Promessuree. The purchaser now brings this suit for the possession of the 8 annas against the defendant, who claims the 8 annas from the heirs of Ram Mohun, the testator.

as dismissed by the Moonsiff, whose decision was reversed on appeal by the Subordinate Judge. In special appeal, the judgment of the Subordinate Judge was reversed, and the case annulled. The plaintiff then appealed under section 15 of the Patents Act.

1878
 RAM KANT
 CHUCKER-
 BUTTY
 v.
 CHUNDER
 NARAIN
 DUTTA ROY.
 Judgment.

Baboo Golap Chunder Sircar, for Appellant.

Baboo Grish Chunder Chuckerbutty, for Respondent.

The judgment of the Court (1) was delivered by

GARTH, C.J. :—

GARTH, C.J.

We think that the judgment of the High Court should be reversed, and that the judgment of the Subordinate Judge should be restored.

As regards the construction of the will, we think it clear that the widow had 8 annas of the property left to her only for her life, but, as to the other 8 annas, she was allowed to dispose of the property for the purpose of providing for her husband's *gradh*, or going on a pilgrimage. It may be, as the Moonsiff says, that these are purposes for which, by Hindoo law, quite apart from any question of a widow would have power to dispose of property which she derived from her husband. That is a point which it is not necessary to consider in this case.

The question here is, whether the purchaser, who, as found by the Subordinate Judge, has purchased this property, and has paid the purchase-money *bond fide* to the widow, believing and having reason to believe that she was going on a pilgrimage, and that the property was sold, and the money raised for that purpose, is liable to restore back the property, and to have the sale annulled, at the instance of the reversioner.

Speaking only for myself, I should say, that, even supposing it had not been proved in this case that the widow actually went on a pilgrimage, the sale would be valid and binding. But it is necessary for us to decide that point here, because the Subordinate Judge has found, as a fact, that she did go on a pilgrimage.

(1) GARTH, C.J. and McDONNELL, J.

1878
 RAM KANT
 CHUCKER-
 BUTT
 v.
 CHUNDER
 NARAIN
 DUTTA BOY.

Judgment.

GABTE, C.J.

He has found it upon the evidence of one witness, whose statement has been read to us. It was a question for him to say what that statement meant, and he has found, as a fact, that he did go on a pilgrimage to the Ganges, some six or seven days journey.

As, therefore, the Subordinate Judge has found that this was a *bonâ fide* purchase, by the defendant, under the full impression of belief, that it was sold for purposes authorized by the will, as he has also found as a fact that those purposes were sufficiently carried out, we see no reason whatever for questioning his conclusion at which he has arrived. We, therefore, confirm his judgment, and reverse that of the learned Judge of this Court with costs of both hearings in this Court.

[CIVIL APPELLATE JURISDICTION.]

April 11.

ISSEN MEAH PLAINTIFF
 AND
 KALARAM CHUNDER NAW DEFENDANT

Act X of 1873—The Oath's Act—Refusal to take an oath—Adverse presumption.

Where the lower Appellate Court, at the instance of the defendant, called upon the plaintiff to swear on the Koran that the defendant's case was false, which the plaintiff refused to do: *Held*, that the lower Appellate Court was justified in raising a presumption, from the plaintiff's refusal, that his case was false, the Court having power to act as it did under the provisions of Act X of 1873.

SPECIAL APPEAL from a decree passed by the Commissioner of Cachar, reversing that of the Moonchuk Cherokee-Hattia Kandel.

This was a suit for possession. Plaintiff and defendant purchased the property from the same person; defendant was in possession, but plaintiff claimed to be prior purchaser. The defendant produced his purchase deed, on which plaintiff's name appeared as witness, and he offered to abandon all claims to the land if the plaintiff would take the Koran in his hands and declare that the defendant was not a prior purchaser of the land in dispute.

the plaintiff, was not a witness to the execution of the deed. The plaintiff refused to swear, and partly on this account the lower Court reversed the decree of the first Court and dismissed the suit. Plaintiff then brought this special appeal.

1878

ISSEN MRAH
v.
KALARAM
CHUNDER
NAW.

Judgment.

By *Bharut Chunder Dutt*, for Appellant.
By *Shee Serajul Islam*, for Respondent.

Judgment of the Court (1) was delivered by

J. :—

MITTER, J.

It came to me that in this case the lower Appellate Court was misled by the provisions of Act X of 1873 in calling upon the plaintiff at the instance of his adversary to give evidence on oath in the particular form mentioned in its judgment. The plaintiff refused to take that form of oath, it was competent for the Appellate Court to raise an adverse presumption against him, therefore, see no reason to interfere with the judgment of the lower Appellate Court. The appeal is dismissed with

(1) MITTER, J.

[REVIEW OF ORDER.]

1878
May 11.

KALLY PROSAD RAE PETITIONER

AND

MAHU CHUNDER ROY OPPOSITE PARTY

Suit on a mortgage bond—Lands in different Districts—Sonthal Pergunnahs—Act XXXVII of 1855, sections, 1, 2, 4—Act VIII of 1859, sections 12, 38—Act XXIII of 1861, section 39—Bengal Regulation I of 1872.

A hypothecated to B, as security for the repayment of Rs. 600, certain lands situated partly in the District of Moorshedabad and partly in the Sonthal Pergunnahs. In 1876, B instituted a suit in the Court of the Subordinate Judge at Moorshedabad, for the recovery of money due on the bond by a sale of the lands hypothecated. It was contended that the Sonthal Pergunnahs was a district within the meaning of section 386, Act VIII of 1859; and that, therefore, the High Court had power to grant the leave requested.

THIS was an application for review of an order passed by the High Court on an application submitted by the Subordinate Judge at Moorshedabad.

The applicant instituted a suit in the Subordinate Judge at Moorshedabad against the opposite parties, some of whom were residents of Moorshedabad, and the rest of Dumka in the Sonthal Pergunnahs, for recovery of money due on a mortgage bond by sale of the properties comprised therein. Some of these properties are situated in Moorshedabad and some in Dumka.

Under section 12, Act VIII of 1859, and section 3, Act XXIII of 1861, the Subordinate Judge applied to the High Court for leave to try the suit. The High Court declined to give leave on the grounds that (1) it had no jurisdiction in Dumka, and (2) Act VIII of 1859 is not in force there. The Subordinate Judge thereupon, by an order of the 21st April 1877, returned the application to the petitioner. On the 17th July 1877, the petitioner applied to the High Court, praying that its resolution refusing leave to the Subordinate Judge might be reconsidered; that the

ordinate Judge returning the plaint might be set aside; at leave might be given for the trial of the suit by the Subordinate Judge upon the plaint thus returned. On this, the High Court issued a rule nisi, to show cause why the application should be granted.

1878
KALEY
PROBOD RAN
v.
MAHU CHUN-
DER ROY.
—
Judgment.
—

so *Hurry Mohun Chuckerbutty*, for Petitioner.
Opposite Party did not appear.

Judgment of the High Court (1) is as follows:—

question raised by this application is whether, in 1876 and 1877, Act VIII of 1859, applied to the Sonthal Pergunnahs subject of suits in which the subject of dispute exceeds Rs. 1000 in value.

petitioner instituted a suit valued at Rs. 6,197-9-0 on a mortgage bond by which certain properties, lying partly within the jurisdiction of the Civil Court at Moorshedabad and partly that of the Court at Dumka, in the Sonthal Pergunnahs, were pledged, and sought to get a decree specifically declaring the liability of those properties in respect of the debt covered by the bond. This suit was instituted in the Court of the Subordinate Judge at Moorshedabad, who made a reference to obtain sanction from the High Court, under section 12, Act VIII of 1859, to his continuing with the suit.

On the 17th of April 1877, an order was made by a Judge of the Court before whom, in the ordinary course of business, such references were laid, declining to give the authority sought on the ground that (1) that this Court does not exercise jurisdiction in such cases; and (2) that Act VIII of 1859 was not in force there. The petitioner has now appeared to ask for a reconsideration of the order, and has obtained a rule calling upon the defendants in the suit to show cause why the Moorshedabad Court should not be authorised to determine the question of the liability of the properties situated within the jurisdiction of the Court at Dumka for the debt secured by the bond. The defendants have not appeared to show cause.

Act XXXVII of 1855, section 1, the Sonthal Pergunnahs, and in the Schedule to that Act (modified by X of 1857),

(1) AINSLIE and McDONNELL, J.J.

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were removed from the operation of the General Regulations and of the Laws passed by the Governor-General of India in Council, except so far as thereafter provided; and it was enacted that no law to be thereafter passed by the Governor-General of India in Council should be deemed to extend to any part of the said districts, unless the same should be so named therein. The second clause of the first section provides that "the said districts shall be placed under the superintendence and jurisdiction of an officer or officers to be appointed on that behalf by the Lieutenant-Governor of Bengal, and such officer or officers shall be subject to the directions or control of the Lieutenant-Governor." The second section runs thus, "Provisions not bearing on this question now before us: administration of civil justice, &c., are now vested in the officer or officers to be so appointed: Provided that all civil suits in which the matter in dispute shall exceed the value of one thousand rupees shall be tried and determined according to the General Laws and Regulations in the same manner as if this Act had not been passed." The third section provides for a reference to the Sudder Dewany Adalat in criminal trials in which sentence of death may be passed, and in any other class of criminal trials which the Lieutenant-Governor might be directed by the Lieutenant-Governor to refer to that Court. In respect of civil suits the first clause of this section makes the judgment of the officer appointed under the Act final to the extent of the jurisdiction from time to time conferred upon them respectively by the Lieutenant-Governor of Bengal, but with a proviso that "it shall be lawful for the Lieutenant-Governor to direct that an appeal shall lie in any class of civil suits from any officer appointed under the Act to any other officer appointed under the same."

This was the state of the law in the Sonthal Pergunnah when the Code of Civil Procedure was enacted. By the 385th section of that Act it was enacted that the Act was not to take effect in any of the territories not subject to the General Regulations, unless the same should be extended thereto by the Governor-General of India or by the local Government to which such territories were subordinate, and (the extension) notified in the Gazette.

, Act XXIII of 1861 then provides that : "When under the provisions of section 385 of the said Act (VIII of 1859), the Act is extended to any of the territories not subject to the General Regulations, it shall be lawful for the Government to which the territory is subordinate, to declare that the Act shall have effect therein, subject to any restriction, limitation or proviso which it may think proper. In such case the restriction, limitation or proviso shall be inserted in the notification of such extension. When the Act is extended by the local Government to a territory subordinate to such Government, and such extension is made subject to any restriction, limitation or proviso, the previous sanction of the Governor-General in Council shall be requisite." By notification of the 19th August 1867 (*Calcutta Gazette*, page 1869), the Lieutenant-Governor of Bengal notified, for the provisions of section 385, Act VIII of 1859, and section 3 of Act XXIII of 1861, that, from the 1st day of October 1867, the provisions of Act VIII of 1859 and XXIII of 1861 were extended to the Sonthal Pergunnahs subject to certain provisions, restrictions and exceptions, which are immaterial for the present purpose.

We come now to Bengal Regulation I of 1872, made under the authority conferred by 33 Vict., Cap. 1, and which, by section 2, is to be read with Act XXXVII of 1855. The first paragraph of the third section runs thus :—"Subject to the provisions of the Regulation, the Regulations and Acts mentioned in the Schedule annexed to this Regulation, or such portions of them as are unrepealed, shall be deemed to be in force in the Sonthal Pergunnahs. No other Regulations or Acts shall be deemed to be in force in the Sonthal Pergunnahs except so far as relates to the trial and determination of the civil suits mentioned in section 2, Act XXXVII of 1855, in which the value in dispute exceeds the value of Rs. 1,000, when such suits are tried in the Courts established under Act VI of 1871. The second paragraph power is given to the Lieutenant-Governor to add to the Regulations and Acts mentioned in the Schedule, and to cancel or modify such addition. Section 4 follows in these terms: "The Lieutenant-Governor of Bengal may, by notification in the *Calcutta Gazette*, invest any competent officer in the Sonthal Pergunnahs with the powers of

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any Civil Court established under Act VI of 1871, and exclude the whole or any part of the said Pergunnahs from jurisdiction of any of the Courts established under the said now having jurisdiction therein. Nothing in sections 3 (inclusive), 32, 33, and 34 of the said Act applies to any invested with the powers of a Court under this section, but the other provisions of the said Act apply *mutatis mutandis* to officers invested."

By a notification in the *Calcutta Gazette* of 1873, dated August 1873 (Part I., p. 935), the Lieutenant-Governor notified the jurisdiction exercised by the Courts of Beerbhoom, Bhaugulpore within the Sonthal Pergunnahs, in respect of suits in which the matter in dispute exceeds the value of Rs. 1,000 (except as to pending cases), and vested the jurisdiction in the Commissioner, for the time being in charge of the district of Sonthal Pergunnahs, with the powers of a District Judge described in Act VI of 1871, and the officers in charge of the divisions with the powers of a Subordinate Judge under the said Act for the purpose of administering civil justice in suits in which the value exceeds Rs. 1,000 in value.

Acts VIII of 1859 and XXIII of 1861 are not included in the schedule of Regulation I of 1872. Therefore, the notification of the 19th of August 1867 was superseded, and these Acts are to be in force in the Sonthal Pergunnahs, unless they are excluded in respect of suits in which the subject-matter exceeded Rs. 1,000 in value, by virtue of section 2, Act XXXVII of 1855, and section 1, section 3, of the Regulation of 1872.

The effect of the provision in section 2, Act XXXVII of 1855 appears to us to have been to leave all civil suits, in which the value of the subject exceeded Rs. 1,000, to be tried by the Courts which would have tried them if this Act had not been passed, and not merely to make them triable by the specially-appointed Courts according to the General Laws and Regulations, and this is established by the latter part of the first paragraph of Regulation I of 1872, which distinctly refers to the trial of suits in Courts already established under the Bengal Civil Act (VI of 1871), and also by section 4, by which the Lieutenant-Governor is empowered to exclude the whole or any part

Sonthal Pergunnahs from the jurisdiction of the Courts already established under Act VI of 1871, and to invest the Sonthal Pergunnahs' officers with the powers of such Courts.

In fact, we find that suits in respect of land within the Sonthal Pergunnahs have been tried in the ordinary District Courts, and that appeals in such suits have been heard in this Court. Thus, regular Appeals Nos. 1, 2, 3 and 4 of 1860, were from decrees of the Subordinate Judge of Beerbhoom in respect of property (Dook Rohni) within the Sonthal Pergunnahs, as stated in the list, and Nos. 16 to 19 of 1865 were regular appeals from the decree of the Judge of Beerbhoom, also in respect of the same property.

There can be no doubt that the Act of 1855 was held to leave civil suits above Rs. 1,000 in value to be tried by the ordinary District Courts under the law in force for the time being, and that Act VIII of 1859 applied to such suits, at least up to the extent, by Government notification of 1873, of the jurisdiction of such Courts within the Sonthal Pergunnahs.

The question then comes to this: When the Lieutenant-Governor, in 1873, by notification, put an end to the jurisdiction of the Courts, which up to that time had jurisdiction in suits of greater value than Rs. 1,000, did he thereby terminate the jurisdiction, within the Sonthal Pergunnahs, of all Regulations and Acts not mentioned in the schedule of Regulation I of 1872, and consequently of Act VIII of 1859?

It seems to us that he did not do so; for while he terminated the jurisdiction of the Courts previously constituted under Act VI of 1871, he substituted a new set of Courts under that Act by virtue of the authority given to him by section 4 of the Regulation, the language of which exactly corresponds with the language of section 10 of Act VI, and these Courts, by section 11, are subject to the superintendence of the District Court. The notification vesting the Deputy Commissioner at the time being in charge of the district of the Sonthal Pergunnahs with the powers of a District Judge, as described in Act VI of 1871, has the effect of making the Sonthal Pergunnahs a "district" as defined in section 386 of Act VIII, 1859, consequently the provisions of section 12 apply to these

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Pergunnahs in cases governed by section 2 of the Regulation of 1872, which preserves the operation of Act VIII of 1859 in suits, in which the subject is above Rs. 1,000 in value, triable in Courts constituted under Act VI of 1871.

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We therefore hold, that this Court has authority to sanction the trial of this suit in the Court of the Subordinate Judge at Moorshedabad, and we accordingly direct that it be tried in that Court. Rule absolute.

NOTE.—In the case of *Narain Chunder Chowdhry vs. Taylor*, Ap. No. 266 of 1878, a rule was issued to show cause why the appeal should not be taken off the file, on the ground that no appeal lay to the High Court from the decisions of Courts established in the Sonthal Pergunnahs. The rule having been argued, the following judgment was delivered by the High Court (JACKSON and MITTER, J.J.):—

“The questions raised in the discussion of this rule have been attended with a good deal of difficulty, and that difficulty has arisen very mainly from the scattered and not easily accessible provisions of the law which regulate the subject. But upon a full consideration of Regulation I of 1872, called the Sonthal Pergunnahs Settlement Regulation, and of the bearing on those parts of Act XXXVII of 1855 which are still in force, it now appears to us there is no doubt that the Court of the Assistant Commissioner, invested with the powers of a Subordinate Judge for the purpose of trying suits of the value of not less than Rs. 1,000, is a Court subject to the jurisdiction of the High Court, and that where the value of the subject-matter exceeds Rs. 5,000, an appeal is allowed by law and must necessarily lie to the High Court. As long as the powers and functions of the Courts in the Sonthal Pergunnahs were based upon powers conferred upon them by the Lieutenant-Governor of Bengal according to the provisions of Act XXXVII of 1855, it seems to me clear that all the decisions were final, with this exception, that it was lawful for the Lieutenant-Governor to direct that an appeal shall lie in any class of civil suits or criminal trials from any officer appointed under this Act to any other officer appointed under the same.

“In making this statement, we do not at present refer to the exceptions in cases of Subordinate Judges stationed in the Districts of Moorshedabad, Bhaugulpore, and Beerbhoom, who appear (under what circumstances, we are not certain) to have exercised jurisdiction within the Sonthal Pergunnahs after the passing of Act XXXVII of 1855. We are referring only to the cases of officers of those Pergunnahs. But as it seems clear that the framers of Regulation I of 1872 intended to constitute and maintain, on the one side with the Courts empowered under Act XXXVII, a separate system of Courts analogous to those described in Act VI of 1871, and the powers of the last mentioned Courts were not conferred upon them un-

provisions of Act XXXVII of 1855, it appears to follow that the provisions of such Courts fall under the general provisions of the law relating to appeals within the Bengal Presidency, and that consequently by the second clause of section 22 of that Act, an appeal, where the amount or value of the subject-matter in dispute exceeds Rs. 5,000, will lie to the High Court. That being the view which we now take of the law, we think the rule must be discharged. Considering that the question of law involved was one of considerable doubt and difficulty, we think there should be costs of this rule."

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[CIVIL REFERENCE.]

IN THE MATTER OF ABDOOL HAMID, PETITIONER.

Insolvency Jurisdiction—District Judge of Akyab—Recorder of Akyab—Burmah Courts' Act XVII of 1875—Code of Civil Procedure, Act X of 1877, sections 4, 6, 344, 351.

June 20.

The Judge of the District Court at Akyab has jurisdiction to exercise the powers conferred by section 351 of the Code of Civil Procedure, Act X of 1877, in respect of a prisoner in the Civil Jail at Akyab, who has petitioned to be declared an insolvent under that section.

The Recorder of Akyab has not exclusive jurisdiction in such cases, though it may be that the effect of section 6 of the Code of Civil Procedure, Act X of 1877, is to make his jurisdiction paramount to that of the District Judge.

Section 66 of the Burmah Courts' Act, 1875, and sections 4, 6, 344, 351 of the Code of Civil Procedure, Act X of 1877, discussed.

REFERENCE, under section 54 of the Burmah Courts' Act, from the Judicial Commissioner of British Burmah.

The judgment of the High Court (1) on the reference submitted is as follows:—

Two questions have been submitted to us by the Judicial Commissioner of British Burmah under the provisions of section 54 of the Burmah Courts' Act:—(1.) Whether the District Court at Akyab has any jurisdiction, and, if so, a concurrent jurisdiction in the town of Akyab under chapter 20 of Act X of 1877, whether the Recorder has an exclusive insolvency jurisdiction in that town, under 11 and 12 Vic., ch. 21. (2.) Whether,

(1) MAREBY and PRINSEP, J.J.

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within that town, the District Court has jurisdiction, under Chap. 20 of Act X of 1877, over persons whose "residence" is outside that town.

This reference arises out of the application of one Abdool Hamid, a prisoner in the Civil Jail of Akyab under an order of the Judge of the District Court of Akyab. Abdool Hamid applied to the Deputy Commissioner of Akyab, as District Judge, to be declared an insolvent under section 351 of the Code of Civil Procedure. Some of the creditors of Abdool Hamid objected to this order being granted. The Deputy Commissioner, being in doubt as to his jurisdiction, referred the question to the Judicial Commissioner, who has referred the matter to us.

The only objection to the jurisdiction of the Deputy Commissioner with which we have to deal upon the present reference, that arising out of section 66 of the Burmah Courts' Act and sections 4 and 6 of the Civil Procedure Code. Section 66 of the Burmah Courts' Act provides that within the towns of Rangoon, Moulmein, Akyab and Bassein, the Recorder shall have and exercise such powers and authorities, with respect to insolvent debtors and their creditors, as are for the time being exerciseable with respect to insolvent debtors and their creditors by the High Court or a Judge thereof in Calcutta. Section 4 of the Code of Civil Procedure provides, that nothing in the Code shall be deemed to affect the Burmah Courts' Act, 1875. Section 6 of the Code of Civil Procedure provides, that "nothing in the Code" affects "the jurisdiction or procedure of the Recorder of Rangoon, sitting as an Insolvent Court in Rangoon, Moulmein, Akyab or Bassein." Section 344 of the Code of Civil Procedure, under which this application was made, provides that any person arrested or imprisoned in execution of a decree for money, may apply in writing to be declared an insolvent; "such application shall be made to the District Court which ordered his arrest or imprisonment, or, where the District Court did not make such order, then to the District Court to which the Court that made the order is subordinate."

These being the provisions of the law, we have no doubt that the Deputy Commissioner had jurisdiction to entertain the application. We consider that the provisions of section 6 of the Code of Civil Procedure do not interpose any obstacle in

may of the Deputy Commissioner dealing with this application. His doing so will not, in our opinion, affect the jurisdiction of the Recorder within the meaning of that section. It may be, that, this same Abdool Hamid should ever be declared an insolvent. If the Recorder, the Deputy Commissioner would be, bound, to suspend further proceedings. But, until that event happens, there appears to us to be no reason why the Deputy Commissioner should not proceed to the exercise of the powers conferred on him by Chap. 20 of the Code of Civil Procedure, with reference to this person. To hold the contrary would be a manifest hardship. We understand, from the observations of the Deputy Commissioner, that the Recorder never sits as an Insolvent Court at Akyab, and prisoners therefore in the Civil Jail in Akyab, if they cannot apply to the Deputy Commissioner, are in a worse position than other prisoners for debt under the new Code. The result would in fact be that they would always have to stay in their full time in jail; an application to the Recorder sitting in Rangoon being practically impossible. The decision of the Bombay Court, 7 Bomb., 6 *Crown cases*, referred to by the Judicial Commissioner, turns upon the construction of the words "in any way affect," as used in the 24 and 25 Vic., ch. 67, section 1. Words of this kind must be construed with reference to the general provisions of the Act of which they form a part. The decision of the Bombay Court can scarcely, therefore, throw any light upon the construction of Act X of 1877. These observations sufficiently answer the first question referred to us. With regard to the second question, we do not see how it can be; but, so far as the present case is concerned, we do not think it makes any difference whether Abdool Hamid was, or was not, a resident in Akyab.

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[CIVIL APPELLATE JURISDICTION.]

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MARIA ELLEN HOWARD PLAINTIFF

AND

CHARLOTTE MARGARET WILSON DEFENDANT

Arbitration—Award—Misconduct of Arbitrator—Confirmation of Confidential communication—Letter written "without prejudice"—Act IX of 1871, sch. II., cl. 155—Misconduct of party—Refusal to pass judgment on award—Appeal.

Where the matters in dispute in a suit are, before judgment, referred to arbitration and an award made, the refusal of the Court to pass judgment on the award is a judgment upon the whole subject of the suit, and an appeal will lie therefrom.

The fact that an arbitrator innocently makes a mistake in taking as evidence, a document which, according to law, ought not to have been received, is not sufficient to justify the Court in refusing to pass judgment, in refusing to pass judgment according to the award.

A sued B for arrears of rent. After the plaint was filed, B, by his attorney, verbally offered to give Rs 1,500 and costs in full settlement of A's claim. In a letter, written "without prejudice," B declined the offer. The suit was afterwards referred to arbitration. Previously to signing his award, the arbitrator intimated to A that he should allow A the sum of Rs 1,520 and costs. At a subsequent meeting, called by the arbitrator in consequence of a communication from B, the letter which had been written "without prejudice" was produced. The arbitrator decided that the costs of both parties incurred from the date of the offer of Rs. 1,500 should be paid by A. POSTERIOR to the award, on the ground that the arbitrator had been induced to alter his original decision, by a letter improperly produced to him by B. *Held*, on appeal, that this ground was insufficient, and that the learned Judge should have confirmed the award.

Baboo Okintamun Singh vs. Ruppa Kooer, 5 W. R. 187, distinguished.

THE plaint in this suit was filed, on the 9th day of June 1876, against C. H. Wilson, for the recovery of Rs. 300 as rent for certain premises situate at Barrackpore, belonging to the plaintiff, and leased to the defendant, and a further sum of Rs. 100 as damages for breach of a covenant in the lease to repair.

On the 25th of March 1878, an order was made that all matters the suit should be referred to the arbitration of Mr. David Mackay, who proceeded with the reference.

On the 18th of May 1878, the arbitrator gave judgment in favour of the plaintiff for Rs. 1,520, and that the defendant should pay to the plaintiff the costs of the plaintiff in the suit and of the reference and award, and of obtaining judgment on the award. The award, though given, was not formally signed by the arbitrator.

On the 22nd of May 1878, in pursuance of notice, both parties appeared on the arbitrator, in the matter of the reference, and the arbitrator announced as his final decision:—That the defendant should pay to the plaintiff Rs. 1,520; that the costs of the suit up to January 7th, 1878, should be paid by the defendant, and that the plaintiff should pay her own subsequent costs. Costs of arbitration, &c., to be borne by the parties in equal shares.

The plaintiff objected to this change in the original decision by the arbitrator, the reason for which seems to have been as follows:—In consequence of a verbal offer of Rs. 1,500 and a settlement of the suit, on the 2nd of January 1878, the plaintiff's attorneys, on the 7th of January 1878, wrote a reply to the defendant's attorneys, stating that they would accede to it. This refusal, which was written "without prejudice," was brought to the notice of the arbitrator without the knowledge of the plaintiff's attorneys, previous to the meeting on the 22nd of May, and the letter was read out at that meeting, by the arbitrator, notwithstanding their objections. The arbitrator gave his amended decision which was drawn up and signed by him. The award was filed in Court on the 23rd of May, and on the 28th of May a notice was issued to the plaintiffs, stating that the award had been filed, and that the Court would proceed to give judgment on the award, on Thursday the 13th of June. On the date just mentioned the motion came on for hearing, the plaintiff appearing to oppose judgment being given.

The defendant, for the defendant, contended that the plaintiff had *locus standi*, that he ought to have come in within ten days, and that he had intended to make any objection; and that the case was

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in the board of the day merely for the purpose of judgment being given on the award. [The Court allowed the plaintiff on.]

Jackson, for the plaintiff, said it was argued that he had a right to be heard in opposition to the motion, as he did not appear within ten days of the award being filed in Court, under Act of 1877, Sch. II., cl. 158; but the Limitation Act did not apply to this case. He appeared on notice given by the other side, and would be a totally useless proceeding if he could make no objection when he did appear.

Stokoe, for the defendant, in support of the motion for judgment on the award, contended that the plaintiff was not to object, he not having come in within 10 days of the award being filed in Court. He also contended that the costs were to be at the discretion of the arbitrator, the proceedings having commenced under Act VIII of 1859; that there was no ground in the case to justify the Court in refusing to confirm the award, and that, even if the arbitrator decided points of law or evidence incorrectly, the parties would have to put up with it.

Jackson (in reply).—The action of the arbitrator in admitting the letter amounted to misconduct—*Harvey vs. Shelton*, 7 Beavan, 100; should not have received the letter in evidence, as it was written without prejudice—*Halford vs. East Indian Co.*, 12 B. L. R., App. 19; and the mere fact of his receiving it is sufficient to set aside the award—*Walker vs. Walker*, 6 Vesey, 70; *Haigh vs. Haigh*, 3 DeGex, F. 12. The letter was not evidence even though admitted—1 B. & C. Evid., 649; *William vs. Thomas*, 2 Dr. & Sm., 29.

PONTIFEX, J. PONTIFEX, J. :—

I shall refuse to pass judgment on the award, on the ground that the defendant communicated with the arbitrator behind the back of the other party; and that the defendant, to induce the arbitrator to alter an opinion he had formed, used a letter which he was not entitled to put in in evidence, and which he was in honor not to produce.

The defendant appealed.

Allen, for the Appellant.—The questions are : (1) was the arbitrator correct in having the letter read ; and (2) had the Judge power to do anything but pass judgment according to the award ? In regard to the first point, the matter was first brought to the arbitrator's notice in the meeting, and the letter was not privileged for the purpose for which it was used.

GARTH, C.J.—It is quite clear this was a confidential communication. It was made in the course of a negotiation, and the letter was written without prejudice.]

Allen.—The Evidence Act does not apply to proceedings before arbitrators. See section 1 of the Evidence Act.

GARTH, C.J.—The meaning of that is that the strict rules of evidence do not so apply. It does not refer to those rules which are founded on the clearest public policy.]

Allen.—There has been no misconduct here either on the part of the arbitrator or of the defendant ; even admitting the defendant to have done wrong, there is nothing in Act VIII of 1859, which allows an award to be rejected for the misconduct of a party to the arbitration.

Jackson, for the Respondent.—No appeal lies in this case. This is a judgment. In the grounds of appeal the other side admit it is an order, and *Baboo Chintamun Singh vs. Roopa Koor*, 1 R., Mis., 83, shows there is no right of appeal where an award is passed refusing to file an award. The section of the Act itself does not contemplate an appeal in such a case.

GARTH, C.J.—What is the effect of the Judge's order, if it is to re-open things *de novo*. It is certainly an adjudication.]

Jackson.—The same argument might have been addressed to *BARNES PEACOCK* in the case in 6 W. R., Mis., 83. Besides, there has been misconduct here. The arbitrator communicated with one party behind the back of the other, and *Harvey vs. Beavan*, 7 Beavan, 462, shows that an award will be set aside for communications of this kind.

Allen, in reply.

The judgment of the Court was delivered by

GARTH, C.J. (*MARKBY, J.*, concurring) :—

This was an appeal against the refusal of the Court below to set aside judgment on an award under section 325 of Act VIII

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a communication was made by the defendant to the arbitrator the result of which was that the arbitrator held another when the defendant for the first time raised a point, before the matter was referred to arbitration, he had made to the plaintiff of Rs. 1,500, he ought not to be made the costs of the arbitration.

In support of this contention, the defendant's produced a letter, received by them, before the referee the plaintiff's attorneys, which letter was in these terms:

"DEAR SIR,—Referring to our interview with you on instant, we have to inform you, that we submitted you to pay Rs. 1,500 and our costs in full settlement, been instructed to decline the same. As to the alternative to refer the matters in difference in this suit to arbitration we are instructed to say that Messrs. Mackintosh & Co. were asked by Mr. Howard to survey the premises, and make an estimate, before the works were commenced by Mr. Howard but that they declined to do, on the ground that they were aware that litigation might ensue. Mr. Howard understood that Mr. Osmond was a personal friend of the late Mr. Howard and attributes the refusal to survey and estimate to them and under these circumstances he cannot consent to arbitration by a member of that firm. Mr. Howard is willing that the matter should be referred by order of the arbitration of two persons (one to be named by each) their umpire to be nominated before entering on the duties."

this letter being produced, the plaintiff's attorneys to any further evidence being received by the arbitrator on the ground that the proceedings were closed, and the previous meeting, the arbitrator had declared the terms award. The arbitrator, however, received the letter, and (mainly upon the strength of it) decided that the plaintiff ought to have the costs of any proceedings after that letter written; and he, subsequently, on the 23rd day of May 1878, made an award accordingly. The defendant then applied to the Court under section 325, asking the Court to give judgment enforcing the award, but the learned Judge refused the application upon the ground that the defendant had improperly communicated with the arbitrator behind the back of the other party, and used a letter, which was written "*without prejudice*," to induce the arbitrator to alter his opinion.

But this decision of the Judge, the defendant has appealed; and the first question we have to decide is one raised by the refusal, whether any appeal lies at all from the refusal of the Court to confirm an award. It is said that the refusal was not a refusal within the meaning of section 15 of the Charter; and that the Bench decision, reported in 6 W. R., Miscellaneous, 83, is in support of that contention, where it was held that an appeal does not lie against the refusal of a Judge, to allow an application to be filed under section 327. But we think that case is hardly distinguishable from the present. The application was made in a case referred (not in a suit, but) by agreement of the parties. The object of the application was to give the Court jurisdiction in the matter, and to enable the successful party to enforce the award summarily, by judgment and execution. But in that case have brought a suit upon the award, so as to enforce it in another way; and, if any doubt existed as to whether the award was valid or ought to be enforced, the Court has the right (in analogy to the rule which is observed in cases in England) to leave the party to his remedy by a writ. That question was one entirely for the discretion of the Court to whom the application was made; and his refusal to make an award to be filed did not deprive the successful party of his rights under the award, but only of his *summary remedy*.

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In this case, the reference was of a different nature. made in a suit ; and it is by no means clear that, if the were not confirmed by judgment, there existed any enforcing it. Be that as it may, it appears to us that in a case as this, the refusal of the learned Judge to give judgment upon the award is, in point of fact, a judgment upon the subject-matter of the suit against the applicant.

The only remaining question is, whether the learned was right in his refusal. Mr. Allen contended that, if the saw no cause for remitting the award to the arbitrator, upon the grounds mentioned in section 323, he was bound to give judgment according to the award, because no application had been made, within the ten days limited by section 324, to set aside the award for misconduct, &c. But we think that, without laying down a rigid rule as that, (which it is not necessary for us to do in the present case,) it is sufficient for us to say that we do not see any sufficient reason in point of law why the learned Judge below should have refused to give judgment upon the award. There is no question that an arbitrator, after he has made up his mind as to the terms of his award, and has informed the parties what those terms are, is perfectly at liberty before the award is actually made, to hold another meeting, if he thinks fit, to discuss any fresh point that may be brought before him ; and there is no objection to the parties applying to the arbitrator for a meeting for the purpose of submitting to him any new point that may arise.

In this particular instance, the arbitrator would have acted more wisely and properly, if he had at once informed the plaintiff's advisers of the precise nature of the communication that had been made to him on behalf of the defendant. The communication, for aught that appears, was of a perfectly unobjectionable character ; and we have really no reason for saying that the arbitrator was guilty of impropriety in retaining it.

Then, as regards the letter itself, upon which the Judge in the Court below has laid so much stress, it is true that it was a very improper thing for the defendant

says to use a letter in evidence which was written "without prejudice," and, obviously, in the course of negotiations between the attorneys on both sides for an amicable adjustment of the plaintiff's claim. Communications such as these are clearly inadmissible in evidence. They are excluded on grounds of public policy and convenience; and the rule of the law which excludes them is as binding upon arbitrators, as upon Courts of Justice, notwithstanding section 3 of the Evidence Act. (See Taylor on Evidence, 7th edition, section 795, and the authorities therein cited.) One is only surprised, that a rule so well known amongst professional men should have been transgressed in this instance by the defendant's attorneys.

The arbitrator, too, was wrong in receiving and acting upon the letter; but, as he was a builder, he was probably not conversant with the law regarding such communications, and therefore so much to blame in the matter as the attorneys, who ought to have known better. After all, the utmost that can be said is, that the arbitrator made a mistake in receiving and using as evidence a document, which, according to law, ought not to have been received. It is not suggested that he knew he was doing wrong; nor does it even appear that the plaintiff's advisers, who were present, objected to the letter being received upon the ground that it was written "without prejudice." They objected on a different ground.

Under these circumstances, we think there was no sufficient ground to justify the learned Judge in refusing to confirm the award. His decision will, therefore, be reversed, and our order will be, that judgment be given in accordance with the award in the usual way. The appellant will have her costs in this Court; and as her advisers were the means of creating the difficulty which led to the decision in the Court below, we think that each of them should pay her own costs in that Court.

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Judgment.

GARTH, C.J.

[ORIGINAL CIVIL JURISDICTION.]

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June 7.IN THE GOODS OF SURGEON-MAJOR JOHN ELLIOTT
(DECEASED.)*Domicile—Succession—Act X of 1865, secs. 10, 13—East India Company
Services—Service of the Crown.*

A medical officer who came out to India in the service of the East India Company in 1850, who was transferred to the service of the Crown by the Act of 1858, 31 and 32 Vict., c. 106, and who, during that service, in Calcutta, in the year 1878, must be considered to have had an Anglo-Indian domicile at the time of his death.

Wauchope vs. Wauchope, Court of Session Reports, 4th Series, p. 945, cited and followed.

THIS was an application for probate of the will of John Elliott, deceased. The will was a holograph will, and was sufficient to pass personal property according to Scotch law, but not according to the law of British India. The next-of-kin opposed the grant of probate on the ground that the domicile of the testator was not Scotch but Indian, and that probate of the will was inadmissible, it being unattested.

It was taken as admitted that Dr. Elliott came to India in 1850 in the service of the East India Company, and the question was whether a will valid according to the Scotch law of personal property in Calcutta.

Paul, Advocate-General, in support of the application.

In order to change domicile, long residence is not sufficient. There must be an intention to change the domicile—*Lord v. Lord*, 10 H. L. C., 272. Domicile is a permanent residence taken up with the intention of abandoning the former domicile—*Whicker vs. Hume*, 7 H. L. C., 124. Here there is not except long residence, and the testator's domicile must be Scotch. [Counsel also cited and commented on *vs. Craigie*, 3 C. & F., 435; *Bruce vs. Bruce*, 3 B. L. R., 616; *Jopp vs. Wood*, 4 De Gex, Jones and Sm., 616; *vs. Matthews*, 8 De Gex, M. and G., 13; *Forbes vs. Kay*, 341.] The Succession Act, section 10, is re-

and governs this case; and the explanation shows that in this case the domicile of the testator must be taken as Scotch.

Jackson, for the next-of-kin, cited *Wauchope vs. Wauchope*, Court of Session Reports, 4th Series, Vol. 4, p. 945.

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PONTREUX, J.

PONTREUX, J.:—

It being conceded on both sides that Dr. Elliott came out in the service of the East India Company in 1850, I think the case is concluded by *Wauchope vs. Wauchope* (1). It is a case with which I agree, and, even if I did not, I should not perhaps be disposed to reject it.

(1) DAVID BAIRD WAUCHOPE vs. CATHERINE BALDOCK AGAN OR WAUCHOPE.—DOMICILE—SUCCESSION—21 AND 22 VICT., c. 103.—INDIAN SUCCESSION ACT X OF 1865, SECS. 10, 12.—*A Scotchman entered the Civil Service of the East India Company in 1841, and remained in it until his death in 1875, when he was on a two years' furlough in Europe. HELD, that neither the 21 and 22 Vict., cap. 106, by which the estates of the East India Company were transferred to the Crown, nor the 10th section of the Indian Succession Act of 1865, affected the domicile the deceased had acquired, before they were passed, in British India; and that domicile was there at the time of his death.*

In this case, the testator, Samuel Wauchope, C.B., was a Scotchman who entered the service of the East India Company in 1841; in 1842 he went to British India; and at the time of his death, which took place at Melberg, Switzerland, on July 23rd, 1875, he was in the service of the Company in British India; the Government having been transferred to Her Majesty in 1858, by the Statute 21 and 22 Vict., c. 106. On the 21st of July 1872, two days before his death, Mr. Wauchope executed a will, attested in the English form. He left no heritable property in Great Britain, but he died possessed of moveable estate in Scotland, of moveable estate in England, and of moveable and real estate in British India. In his will Mr. Wauchope appointed his brother, David Baird Wauchope, his executor as regarded his property in Europe, and certain other persons as executors in India. Mrs. Wauchope having asserted a claim to one-third of the moveable estate of her late husband as falling to her *jure relictae*, on the ground that Mr. Wauchope's domicile was a Scotch one, a question arose as to Mr. Wauchope's domicile, and a special case was presented to the Court. To this special case, Mr. Wauchope's executor was first party and Mrs. Wauchope, the deceased's widow, the second party.

It was argued for the executor that, by becoming a civil servant of the Honourable East India Company in 1842, Mr. Wauchope became a domiciled non-Indian for purposes of succession; that an acquired domicile could not

Act of 1858, he fell under the rule that servants of the Crown not domicile of origin. The following judgments were delivered :

LORD JUSTICE CLERK.—The questions which here arise, as to the of the late Mr. Samuel Wauchope, have not, as far as I am a made the subject of any authoritative judgment. They are, fir the transference of the territory and administration of British the East India Company to the Crown has altered the status or the civil servants of the Crown in that country ; and, secondly, it be not so, the status and domicile is affected by the recent Act the Indian Council, entitled "an Act to amend and define the testate and testamentary succession in British India?"

In regard to the first of these questions, I assume it to hav elusively decided in the case of *Bruce*, and the other decis followed on Lord THURLOW's judgment in that case, that residen in the service of the East India Company, either in civil or militar constituted an Indian, and therefore, for the purposes of suc English domicile. It may, no doubt, be a question whether tl which this result was arrived at were altogether unimpeachable, been confirmed in so many subsequent cases that it seems to x late now to raise any contention on that subject. It was there I civil servant, covenanting with the East India Company, and India in the discharge of that contract, had sufficiently indicat tion of establishing his domicile there, although, no doubt, h entertained the intention, more or less remote, of returning to ti of his birth. I do not think it necessary to enter at any leng principle on which the combination of residence and intention— and *animus*—are held to denote and determine a change of the origin. This principle has been considered of late in a great many cases. It is enough that it has been conclusively held that servie with the East India Company and continuous residence in

up his residence in India, the Act of that year was passed, transferring the functions of the East India Directors, and the government of the provinces, to the Crown. It has been suggested, in one or two cases, that the decision in the case of *Bruce* proceeded on the fact that the East India Company was a trading Company, and that service with it was equivalent to, if not identical with, service with a foreign government; that now that the service, whether in a civil or military capacity, is service under the Crown, the principle of the judgment applies.

I do not think it necessary to express any opinion on these doubts, except that I should be slow to hold that the coincidence of residence in India, on which the case of *Bruce* proceeded, was in any degree the transference of the government from the East India Company to the Crown. The Government took over the public obligations of the Company, and continued the services of those who had been previously employed by the Company, on substantially the same terms. It is nearly twenty years since that transference was made, and, as far as I know, it has not as yet been decided that any alteration on this question of domicile was there-fore made.

However this question may be solved, it can have no application to the present case. There can be no doubt that Samuel Wauchope acquired domicile in India. The question is whether he has lost it; and as domicile is lost by an intention to abandon it, accompanied by abandonment, it is clear that no such elements are to be found in the present case.

The second question raises some considerations of interest and novelty. It arises from the terms of the Act of the Indian Council of 1865. This Act, in substance and effect, is a codification of the law of intestate and of the succession of British India, contains a series of legal definitions and propositions accompanied with illustrations applicable to the cases there treated of. Among other propositions is this one—“(10). A man acquires a new domicile by taking up his fixed habitation in a country other than that of his domicile of origin.” Then follows these words: “*Example*.—A man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in Her Majesty’s Military Service, or in the exercise of any profession or calling.” It is maintained that these words of themselves had the effect of abrogating the domicile of Samuel Wauchope, and of reviving his domicile of origin. I cannot, however, read them as having any such effect.

It is unnecessary to dispute that, if by a law passed by competent authority, a person resident in any country is declared not to be domiciled in that country, such declaration must receive effect in whatever *forum* it is pleaded, for every country has the right of determining for itself under what circum-

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stances a domicile within it shall be acquired; and if Mr. Wauchope had continued to live in India, under a law which enacted that he should not be domiciled there, it would have been very difficult to resist the conclusion that the intention to abandon the domicile of origin had ceased. It might be different, if the law of the foreign country prescribed certain elements which should constitute a domicile within it. For, in such a case, it might quite well be that the *forum* in which the question was tried might, notwithstanding an international principle, apply its own law of domicile in a question occurring before it. But I imagine that no such conflict can arise in the present case, mainly because the words of this provision cannot, in my opinion, affect a domicile already acquired. Whatever be its true construction—and the words are far too popular and wanting in precision to make its interpretation altogether satisfactory—it is plain that the provision relates to the acquisition and not to the retention of a domicile. Indeed, it is provided by No. 13 of the same Code that a “new domicile continues until the former domicile has been acquired”—a proposition not very philosophically expressed, but in substance manifestly true. The existing domicile must continue until something has been done by the person leaving the domicile to abandon it, in fact and in intention; and therefore, as the explanation adjoined to Article 10 only defines in what circumstances a man is not to be considered as having acquired a new domicile and lost an old one, it cannot be applied to the case of a person who had already acquired an Indian domicile.

I think this sufficiently plain upon the words of the provision, and it would be contrary to all principles of legislation, and a most mischievous precedent, to apply these words inferentially to a case they do not express, and indeed exclude, and to give them a retrospective effect on the state of personal and domestic relations, deeds and conveyances, *mortis causa* as well as *inter vivos*, of all the Civil Servants in India at the date at which the Act passed. I am therefore of opinion that Mr. Wauchope had acquired an Anglo-Indian domicile and that he never lost it.

His Lordship then referred to the second and third questions.

LORD
 ORMDALE.

LORD ORMDALE.—The first question to be answered is—“Was the domicile of the deceased, Samuel Wauchope, Scotch at the time of his death?”

After careful consideration I have come to be of opinion that this question must be answered in the negative. It is true that the late Mr. Wauchope was born in Scotland, and therefore that his domicile of origin was Scotch. But in early life he went to India, where he entered the Civil Service of the East India Company, and continued in that country and service upwards of thirty years, during which time he visited Scotland twice on short leave and once on furlough.

Such being, generally, the state of matters, I think it so clear on the authorities and, especially, the decisions of this Court, and of the House of Lords in the well-known case of *Bruce vs. Bruce* in 1790 (Mox. 4617, 3 F.

peals, 163), that it is impossible not to hold that the late Mr. Wauchope, entering and continuing in India in the service of the East India Company till 1858, when that Company ceased to exist and its interests were transferred to the Crown, had then lost his domicile of origin and acquired an Anglo-Indian domicile.

It was contended, however, that the extinction of the East India Company in 1858, and the circumstance of the late Mr. Wauchope becoming on that date a servant of the Crown, distinguishes the present case from that of *Bruce vs. Bruce*, and renders the principle of the judgment in that case inapplicable. I am unable to think so. It is true that one of the reasons assigned for the judgment in *Bruce's* case was, that the party whose domicile formed the subject of dispute was in the service of the Company, and not in a British regiment which might have been in India only occasionally; but the position of the late Mr. Wauchope was precisely of the same nature after, as well as before, 1858, when the East India Company ceased to exist, and the Crown came into its place. It could no more be said of him, after his service was transferred to the Crown in 1858, than it could previously, that his service in India was only occasional. The reason and principle of the decision in the case of *Bruce vs. Bruce*, appears, therefore, to be clearly applicable to the present.

Neither can I see anything in the "Indian Succession Act, 1865," that can be held to affect the matter. The "explanation" which follows Article 10 in that Act, to the effect that "a man is not to be considered as having taken up a fixed habitation in British India, merely by reason of his residing there for Majesty's Civil or Military Service, or in the exercise of any profession or calling," appears to me to be no more than an announcement in a concentrated form of the settled law on the subject as exemplified by the case of *Bruce vs. Bruce*; for, according to the terms of the judgment in that case, besides the circumstance of the party going to India and entering the service of the East India Company, there were the further circumstances of not having declared any fixed or settled intention of returning to Scotland and remaining there.

If I am right in those views, it follows there is nothing in the present case to distinguish it from that of *Bruce vs. Bruce*. In the present case, I do not doubt the fact that the late Mr. Wauchope was absent from India, and, as may be said, was in Scotland for a short time before his death; but he had not retired from the service in India, but on the contrary was in the receipt of furlough allowance down to his death. He had, therefore, kept up the last his connection with India, and must, I think, be held to have intended to return thither to resume the discharge of his active duties. And it does not appear that he ever declared his intention of ultimately and permanently returning to Scotland.

LORD GIFFORD.—I assume that the information stated in the special verdict, although I feel it to be very meagre, contains the whole facts now

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attainable by the parties, material to the question at issue. Upon this so stated, I am of opinion that the late Samuel Wauchope, at the time of his death, on 23rd July 1875, had an Anglo-Indian domicile, and that his succession must be regulated accordingly.

In the year 1841, Mr. Wauchope, then only about nineteen years of age, entered the Civil Service of the East India Company, and in that year he next year went to British India. At that time the East India Company was a private Company, its rights and interests were not transferred to the Crown till the Statute of 1858.

Mr. Wauchope appears to have entered the Company's Service in the usual way and on the usual terms. His appointment was of a permanent nature, and indefinite as to its duration. In point of fact, that employment lasted till Mr. Wauchope's death, being a period of about thirty-four years. He was in the same service at his death, although as the rights and interests of the Company had been transferred to Her Majesty, he was at that time in the service of the Crown.

During that long period of service, Mr. Wauchope resided in British India, only visiting Scotland three times in all. He married in 1843, and he never took up any permanent domicile anywhere else. He died in Switzerland during an absence from his service; but he continued returning to it, for he was only absent from India on furlough which was not expired at the time of his death.

I think it is fixed by the authorities referred to at the time of the person accepting permanent private employment in British India, and residing there in pursuance thereof, the employment being of a permanent duration and involving lengthened residence in India, acquires an Anglo-Indian domicile, unless there be very strong circumstances and in the contrary. A mere indefinite intention ultimately to return to Scotland, when a sufficient fortune is made, or an adequate retirement is earned, will not *per se* prevent the acquisition of an Anglo-Indian domicile. The present case is a stronger case than usual for holding that an Anglo-Indian domicile was acquired, for not only did Mr. Wauchope marry and settle in India for thirty-four years, but he had no real estate in Scotland, or anywhere else than in India, and he had no patrimony or real estate of any kind, in Scotland by means of which his maintenance with that country might be kept up.

From 1841 to 1858, the East India Company was just a private Company with large possessions in India. If, then, Mr. Wauchope died previous to 1858, and before the East India Company and its interests were vested in the Crown, I think he must have been domiciled Anglo-Indian. I think this is the result of the facts bearing on such a question, and to which your Lordships have agreed. But it was contended that Mr. Wauchope's becoming a servant of the Crown in 1858 raised a different presumption, at least from and after

e Indian Succession Act of 1865 was strongly relied on, particularly planation annexed to section 10, which provides that "a man is not considered as having taken up his fixed habitation in British India, by reason of his residing there in Her Majesty's Civil or Military e, or in the exercise of any profession or calling."

r, if Mr. Wauchope, instead of entering the service of the East Company in 1841, when it was a private Company, had entered the

Service of the Crown after 1858, and particularly if he had 1 subsequent to the Indian Act of 1865, I think there would een very strong grounds for maintaining that he had not thereby lost tch domicile of origin, even although he remained in India for a very erable time. At least, in a case where the facts are so bare as those th in this joint case, and where there are no indications of change of le except the mere circumstances of residence and service, I think the nment of the domicile of origin would not thereby be presumed.

cannot hold that the transference of British India to the Crown in even coupled with the Indian Act of 1865, had the effect of changing gal domicile of all those who had gone out to India long before 1858, ho had, according to the then existing law, acquired an Anglo-Indian prior to the change effected in 1858, and prior to the Indian Act of I do not think any such result can be ascribed either to the vesting Act or to the Indian Succession Act of 1865. It would require some very and explicit enactment to produce an effect so startling as would be ge, whether inversion or reversion, of the legal domicile of the whole then serving the East India Company in British India. I cannot y such effect either to the transference of the East India Company Crown or to the Indian Succession Act of 1865.

I am compelled, therefore, to decide the present case just as if it had in 1858; and if I find upon the facts stated, as I do, that in 1858 Wauchope was a domiciled Anglo-Indian, and if I find upon the facts as I do, that nothing has occurred since 1858 whereby Mr. Wauchope his Anglo-Indian domicile, and has acquired a new one, then I must as I do, that Mr. Wauchope's domicile at his death was Anglo-

interlocutor was pronounced: "Find that the late Samuel pe's domicile was in British India, and therefore find it unnecessary for the other questions and decern: Allow the expenses incurred by lies to this special case to be paid out of the estate."

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[CIVIL APPELLATE JURISDICTION.]

MUSSAMUT BEEBEE TOYBOON . . . PETITIONER;

AND

MAHOMED WAJID OPPOSITE PARTY.

Regular suit to set aside Summary Order—Payment of costs of Summary Order—Costs—Act VIII of 1859, sections 269, 296—Act XXIII of 1861, section 11.

The reversal of a decree by an Appellate Court implies setting aside all that has been done under orders contradictory to the final order in the suit; but where a summary order, made in the course of execution proceedings, has been set aside in a separate suit brought for that purpose, it cannot be necessarily implied that the intention of the Court was to cancel everything that had been done in the course of the summary proceedings.

A person who, in the course of executing a decree, had been put out of possession by an order under section 269, Act VIII of 1859, and who was compelled to pay the costs of that order, brought a suit for its reversal and obtained a decree which was silent as to the costs of the summary order in consequence of the plaintiff not having demanded them: subsequently the plaintiff made an application that the costs of the summary order should be repaid to her: *Held*, that such an application to be an application in the suit in which the summary order was passed, the Court had no power to entertain it under section 11, Act XXIII of 1861, and it should, therefore, be dismissed. *Held*, also, that if the application be considered an application for a new suit which was brought for the reversal of the summary order, the Court had no power to import into the decree in that suit the costs of the summary order which was not specified therein, and that the application must therefore be dismissed.

REGULAR APPEAL from an order passed by the Judge of the District Court at Gaya. The judgment of the learned Judge is as follows:—

"I have heard this case fully argued, and can see nothing for the plaintiff to bring a suit for costs. He quotes *Doorga Pershad Chowdhry vs. Tara Pershad Roy Chowdhry*, 3 W. R., 11 P. C., as authority for the general principle that money recovered under a decree which afterwards reversed may be got back by summary process or

doubt that is so; only I do not see by what description of summary process this money is to be got back. The facts are these :—An order under section 269 of Act VIII of 1859 was obtained against the petitioner, and upheld by the High Court. Then she brought a suit for reversal of it and establishment of her right. After this suit was instituted, the costs of the proceedings under section 269, in which she had failed, were realized from her. She succeeded in getting the order under section 269 reversed, and now wishes to recover the costs which she had to pay under it. The case does not come under section 11, Act XXIII of 1861, and I think there is nothing left for the petitioner but to bring a new suit for the costs."

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The petitioner appealed to the High Court on the ground that the application was governed by the provisions of Act XXIII of 1861, section 11, and that under the Privy Council decision quoted by the learned Judge, the costs might be realized in the execution proceedings. It should be noticed that the petition was a petition in the suit in which the summary order had been passed, and not a petition in the suit which was brought for the reversal of the summary order.

Mr. R. E. Twidale, for Appellant.

Moonshee Mahomed Yusoof for Respondent.

The judgment of the High Court (1) was delivered by

AINSLIE, J. :—

AINSLIE, J.

In the present case certain property was sold, and purchased successively by two persons, in July and September 1870, under two separate decrees.

The second purchaser, in the first instance, obtained possession; the first purchaser, having made an application to the Court which held the sale, that Court, under section 269 of the old Procedure Code, made an order by which the second purchaser was removed from possession and the first purchaser obtained possession of the property. The second purchaser thereupon brought a singular suit to recover the property, by establishing his right under a second purchase and setting aside the summary orders which had been made. In that suit he also asked for mesne profits, but it does not appear that any application was made for the

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costs which had been paid to the first purchaser under the proceedings under section 269. The second purchaser obtained a decree, which awards to him possession of the property with mesne profits. It is silent as to the reversal of the order made under section 269, but it may be taken that it necessarily implied that that order was to cease to have any effect so far as the possession of the property was concerned.

The second purchaser, who is the appellant before us, then asked the Court below for a refund of the costs paid by him in the proceedings under section 269. That application having been refused, the present appeal has been filed.

It is evident that, at the time that the second purchaser instituted his suit, it was open to him to ask for a complete remedy, by adding to his prayer, as contained in the plaint, a further application for an award of the specific sum of money which he had lost by the summary proceedings, but he did not choose to do so. He is not now executing the decree of 1874 in the regular suit, as shown by his petition of August 1875; but even if the matter were to be passed by, and it be taken that this is an application to execute that decree, it must fail, because the Court executing the decree cannot import into it anything which is not specified therein, but has to be added to it by inference from the facts which appear on the face of it. Then, if this is dealt with as an application to re-open the proceedings under section 296, it seems to me that it is not governed by the cases referred to, in which it has been held that the reversal of a decree by an Appellate Court implies an order setting aside all that has been done under orders contradictory of the final order in the suit. When the matter is before the Appellate Court the same suit, between the same parties, is going on, and the order of the Appellate Court is intended to be an order disposing of all questions arising in the suit between the parties, and, if the decree of the lower Court be set aside, it is manifest that all that is necessary, in order to give effect to the order of the High Court, must be taken to be included in that Court's order setting aside the decree; but where the decree is set aside by an order in a separate suit, it is impossible to say how far the Court setting aside that decree would have proceeded. It seems to me, therefore, that the cases cited do not stand on the same footing.

the present case ; and that it cannot be implied, as of necessity, there in a separate suit a summary order has been set aside, that the intention of the Court was to cancel everything that had been done in the course of the summary proceedings. I, therefore, think that this appeal should be dismissed with costs.

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[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF KETABDI MUNDUL.

May 9.

Act I of 1871 (Cattle Trespass Act), section 21—Bench of Magistrates—Jurisdiction—Fine—Imprisonment on non-payment of fine—Repayment to Complainant of Court Fees.

The illegal seizure of cattle, under section 22 of the Cattle Trespass Act (I of 1871), is not a criminal offence. The law allows certain Magistrates to adjudicate compensation to a party injured by an illegal seizure. Court Fees paid by the complainant may form part of such compensation.

It is not lawful to pass a sentence of fine or of imprisonment, in default of payment of the compensation awarded in a matter under section 21 of the Cattle Trespass Act (I of 1871).

CASE referred by the Magistrate of Furreedpore to the High Court as a Court of Revision, that the order of a Bench of Magistrates, sentencing a person under section 21 of the Cattle Trespass Act (I of 1871) might be set aside as contrary to

the facts sufficiently appear from the judgment of the High Court (1) which was delivered by

PRINSEP, J.:—

PRINSEP, J.

In referring this case the Magistrate should have set forth the import of the order which he considered to be contrary to

It appears from the record that Ketabdi Mundul has been convicted by a Bench of Magistrates and fined Rs. 10, under section 21 of the Cattle Trespass Act (I of 1871), of which Rs. 5 have

(1) MARKSY and PRINSEP, J.J.

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PRINSEP, J.

been given as compensation to the complainant, and he has also been sentenced to imprisonment in default of that fine.

We have no doubt that the illegal seizure of cattle, as provided for by section 22, Act I of 1871, is not an ordinary criminal offence. Jurisdiction is given to certain Magistrates to adjudicate compensation to any person complaining of, and proving such seizure for, the loss caused by the seizure and detention, as well as any fines and expenses incurred by the complainant in procuring the release of his cattle.

There is no law that we are aware of subjecting the wrong doer also to a fine. The order, therefore, subjecting him to a fine of Rs. 5 in addition to the sum of Rs. 5, which must be regarded as compensation, is illegal, and must be set aside; this fine, if paid, being refunded.

Nor is the alternative sentence of imprisonment on default of payment of fine legal, and that part of the order must also be set aside, since the law does not provide for any such imprisonment, as it does in cases of compensation under section 209 of the Code of Criminal Procedure.

We are of opinion also that any expenses, in the shape of Court Fees, that the complainant may have incurred in the matter of procuring the release of his cattle, can properly be recovered under section 22 of the Cattle Trespass Act.

It is doubtful, however, whether any part of the proceedings before us are legal, as it is not clear whether a Bench of Magistrates can have jurisdiction over such a matter, and to enable us to decide this point, we must enquire from the Magistrate of the District, whether the Bench is authorized to receive and try charges without reference from him. At any rate, in justice to the party concerned, we must at once set aside so much of the order as is obviously illegal, reserving our final order until the requisite information regarding jurisdiction is supplied.

[The remaining portion of the Magistrate's order was set aside on June 3rd, as it was found that the Bench of Magistrates had no authority to deal with the case.]

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF MOTHOR CHUNDER
DASS } PETITIONER.

1878
May 27.

*Order to open road—Application for a Jury—Local enquiry—Section 521,
Code of Criminal Procedure.*

When the person on whom a notice has been issued under section 521, Code of Criminal Procedure, applies for a Jury, the Magistrate is bound to appoint one, and cannot decide the matter by a local enquiry.

REFERENCE to the High Court, as a Court of Revision, by the Sessions Judge of Jessore, that the order of the Assistant Magistrate of Khoolna might be set aside as contrary to law. The facts of the case appear from the letter of the Sessions Judge:—

One Mothoor Chunder Dass, in a petition, dated 10th Magh 1284 (22nd January 1878), petitioned the Assistant Magistrate of Khoolna, praying that order should be passed for a road, which he calls in his petition "mine," to be opened.

Subsequently a notice of the 26th January, and which may be considered as having been passed with reference to section 521, Code of Criminal Procedure, was issued by the Assistant Magistrate, and objection was made by the applicant Haranundo Butatacharjee in a petition dated the 28th Magh 1284 (9th February 1878), in which *inter alia* a Jury (or as it is called in the petition, a punch-board) was applied for.

A Jury however was granted, and on the 5th March an order was issued, sending the papers to a Sub-Deputy Magistrate for enquiry. The Sub-Deputy Magistrate accordingly visited the spot, made a local enquiry, and submitted a report, with the depositions of seven witnesses annexed, on the subject. On the strength of this report 'corroborating' the Magistrate says, 'his own knowledge of the place before obstruction was made,' the Magistrate by order of the 15th of March directed that the road which had been closed should be opened within three days, etc.

He is of opinion that the Assistant Magistrate's order is bad in law and that it should be set aside. In the first instance action

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was taken, as it may have been, with reference to section 521, and although a judgment was applied for, no notice, so far as it appears, was taken of this request. But after a local enquiry, held by the Sub-Deputy Magistrate, by the order of the Assistant Magistrate, who is in charge of the sub-division but who is not a Magistrate of the first class (vide section 523), the Assistant Magistrate issues the order of the 15th March, directing the opening of the road within three days.

Although it is true that the applicant, Mathew, in his petition to the Magistrate said that the road was his, the Assistant Magistrate has held that the road was a public one, and the Sub-Deputy Magistrate, that it ultimately acquired by long use the character of a public road: and it is not regular or fair to the present petitioner, after in the first instance proceeding as it may be held, with reference to section 521, to ignore his request for a purchase and to pass the order of the 15th March after the enquiry by the Sub-Deputy Magistrate.

Had a Jury been appointed, grounds might have been shown by the applicant, sufficient to make out a case in his favour. It may add with reference to the ruling in 21 W. R., p. 24, an opportunity appears to have been given to the present petitioner of rebutting the Deputy Magistrate's report. Moreover, as we have previously intimated, the Deputy Magistrate was not deputed by a Magistrate of the first class.

The following order was passed by the High Court (1):—

We concur with the Sessions Judge in thinking that the Assistant Magistrate's order of 15th March was illegal.

A Jury having been demanded under section 523, the Assistant Magistrate was bound to appoint one, and his subsequent proceedings must be considered not to have been in accordance with Chap. 39 of the Procedure Code. The order of the 15th March will, therefore, be set aside.

(1) MITTAL and MACLEAN, J.J.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF SHER MAHOMED AND ANOTHER.

1878
June 12.

Section 227, Code of Criminal Procedure—Sentence of imprisonment and fine—Summary trial—Right of Appeal—Duty of Appellate Court—Re-trial.

Where a Magistrate of the first class passes a sentence of imprisonment and fine, his order is appealable. He cannot, therefore, in such a case, make up his record in the manner described by section 227 of the Code of Criminal Procedure.

It is competent to a Court of Session to order a re-trial of a case which is before it on appeal.

CASE referred by the Sessions Judge of Mymensingh to the High Court, as a Court of Revision, that the order of a Magistrate convicting and sentencing the accused in a summary trial might be set aside as contrary to law. The facts of the case appear sufficiently from the following order of the Sessions Judge, and a judgment of the High Court :—

This is an appeal from summary orders of the Magistrate of the District, passed in the course of a summary trial, and dated respectively the 1st and 5th of May. The orders on these dates constitute summary and reasons given by the Magistrate.

The complainant in the case was examined by the Joint-Magistrate on the 17th of April. Of his examination there is the following record :—“Nilram Kaibarta on solemn affirmation : I brought fish from Dacca for sale here. When I came near Bagadaree Chherry, that of Mohima Baboo, two men came and told me to get in my boat, as Datta and Brahma Mahasoyas wanted fish. I obeyed, and then went on, and when I stopped, several men, six, in all, came and removed fish, and threatened me with lathies. I don't know them. Rs. 3-4 value of fish taken.” A police enquiry was ordered by the Joint-Magistrate, and the Magistrate of the District subsequently took up the case.

On the 19th of Bysack 1285, corresponding with the 1st of May 1878, the accused prayed through their vakeels that, as the fish had been looted, according to the complainants' allegation, the case might not be tried summarily.

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 In re
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 MAHOMED.
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The Magistrate, however, tried the case summarily, and sentenced them to one rigorous imprisonment, and a fine of Rs. 20 each, and in default of payment, to be imprisoned for fourteen days each, and directed that Rs. 20 should be given to the plaintiff as damages. Although an appeal lies to this Court from the Magistrate's order, he has not recorded the evidence of the witnesses, nor his reasons for passing the judgment, but has only made a record after the form prescribed by section 227 of the Criminal Procedure Code, except that the date on which the proceedings terminated is not given in the form. It would seem that the Magistrate thought that an appeal did not lie from his order, for he has recorded a note as follows, on the printed form for an appeal sent to him by this Court, under section 279, Code of Criminal Procedure :—"Government vakeel is requested to attend and point out that the case was actually under section 44 of the Code, and no other, and is not appealable as far as the law goes." The Magistrate, however, is mistaken, as, under the second paragraph of section 274 of the Code of Criminal Procedure, an appeal clearly lies from his order.

As regards the Magistrate's "summary and reasons" for his conviction, the statement commences as follows :—"The case is a trader who bought up fish from Dacca to sell. He stopped at Bagadaree, and fish of Rs. 4 looted by the police zemindar, as he believed. The fact of loot is admitted by the pleader for the defence who is engaged by the zemindar. The people were suspected." This part of the summary is correct; but there are other remarks recorded in the summary, and then at the very close of these, there is a note saying : "*N.B.*—I have omitted to record that it appeared that the defendants after their act, offered or pretended to offer compensation, but complainant did not believe them—was frightened, and the offence was reduced to trespass."

There is thus the unusual circumstance, that whilst on the one hand the Magistrate describes as "loot," a case found to be committed in the earlier part of this summary, a note at the close of it states that the offence was reduced, on grounds, to "criminal trespass."

I must say, however, that, besides this inconsistency,

given for the offence being reduced, seem to me altogether inadequate. If a boat is entered upon and fish taken therefrom under threats of *letties*, the fact that payment was afterwards offered does not of itself reduce the offence from extortion to mere criminal trespass.

It appears clear to me that the charge in this case was one which should not have been tried summarily. *Prima facie*, according to the statement of the complainant, on solemn affirmation before the Joint-Magistrate, the charge was one of extortion; and according to a very recent ruling of the High Court, based on other precedents, but passed on a reference from this Court, the Magistrate should not have tried the case summarily.

The order of the Magistrate is now before the Court on appeal, and I am of opinion that there should be a new trial according to the procedure laid down in Chapter XVII of the Code of Criminal Procedure. A copy of the judgment of the High

Bepatoollah, Petitioner.

vs.

Muhammad Shaik, { Opposite
parties.
and 9th May, 1878.

Court in the case noted in the margin (2) was sent to the Magistrate of the District, and the learned Counsel for the prisoners has informed the Court that he

draws that officer's attention to it. Under section 34 (4) of the Code of Criminal Procedure, with special reference to that ruling, this Court would probably be justified in declaring the Magistrate's proceedings void, but there is no authority given in the Criminal Procedure Code to the Sessions Court to direct a new trial, under the circumstances as are here found.

Section 284 of the Code of Criminal Procedure provides only in the case of conviction by a Court, not having jurisdiction, of an offence not triable by such Court.

Under these circumstances, I think the best course to pursue is to refer the case for the consideration of the Honorable High Court, in order that the Court, if they consider the view herein to be a correct one, may declare the proceedings void, and direct a new trial by the District Magistrate. Pending the result of a reference the prisoners will remain, as heretofore, on trial.

The following judgment was delivered by the High Court (1):— This is a reference from the Sessions Judge of Mymensingh,

(1) AINSLIE and BROUGHTON, J.J.

(2) Reported *ante*, p. 374.

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under section 296 of the Criminal Procedure Code. The case came before the Judge on appeal from an order, which clearly was appealable under the 2nd clause of section 274. By section 230, as amended by section 28 of Act XI of 1874, the Appellate Court had the power to order the case to be re-tried, if it thought fit to do so. This reference was not necessary; and we think that the proper course will be to return the record to the Sessions Judge, with instructions to him to dispose of the appeal himself.

The Sessions Judge is quite right in the view that he takes of the proceedings of the Magistrate. Section 227 only applies to cases where no appeal lies. As the Magistrate in this case has passed an order awarding punishment of two kinds, namely, imprisonment and fine, an appeal did lie from his order; and, therefore, he could not legally make such a record as he has prepared under section 227.

It appears that the prisoners have already been more than three weeks in jail; and it will be a question for the Judge to consider whether, under the circumstances, this is not a sufficient punishment for the offence which would appear to have been committed if the story of the complainant be taken to be true. If the Judge takes this view of the matter, it will be mere waste of time for him to direct a re-trial. That is a question which must be dealt with at his discretion.

[CRIMINAL REVISIONAL JURISDICTION.]

THE MATTER OF RAM SOONDER PODDAR AND OTHERS.

1878
June 13.*Sections 406, 409, Indian Penal Code—Jurisdiction—Adequate Sentence—
Court of Revision.—*

Where a Magistrate, erroneously holding that the offence committed was one under section 406, Indian Penal Code, over which he had jurisdiction, instead of under section 409, which was cognizable only by the Court of Session, tried and sentenced the accused, it was held by the High Court as a Court of Revision that his proceedings were contrary to law, and he was directed to commit the case for trial by the Court of Session.

To constitute an offence under section 409 it is not necessary that the property should be that of Government, but that it should have been entrusted to a public servant in that capacity.

HE referred to the High Court as a Court of Revision in that the order of the Deputy Magistrate of Noacolly convicting and sentencing the accused under section 406 of the Indian Penal Code (criminal breach of trust) might be set aside as contrary to law.

The facts of this case appear from the following letter of the District Magistrate, referring the case :—

Chiefly the facts are these :—The Treasury is a public office, established by Regulation II of 1793, for the special object of collecting and accounting for the land revenue payable by landholders to Government. The accused were the men appointed to receive the cash in that office, according to that law. Talook Siton is one of the estates bound to pay land revenue into the Treasury, and the occasion was that of the latbundi or latest day payment of the revenue. For these public officers to misappropriate as they are proved to have done, a sum paid, under these circumstances, is about the most glaring and heinous breach of duty which they could well commit.

The assurance is astonishing. Every payment is by challans; and the collector must get his papers entered in the Account Department,

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In re
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DER FROID-
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and thus pay the cash into the Treasury: when that is done payment is credited in the Treasury Cash Book, and this book and the Accounts Register are compared daily. One of them Ram Soonder, however, was customarily allowed to write the Treasury Cash Book which is the duty of the Treasurer, and the whole matter in his own hands. When the accounts were compared, he easily struck out the item of Rs. 16 which he entered as paid by Talook Sison Gazi, and thus balanced the book. But his impudence did not stop even at this. By misappropriating this sum and falsifying the book, he caused the estate Talook Sison Gazi to appear as one which had defaulted for its Government revenue, and according to Regulation I of 1793 and subsequent regulations that estate was brought to sale for the arrears. Ram Soonder actually bid for and bought this estate at the public sale conducted by the collector. Forgery of a Treasury Cash Book and bidding in a public sale are punishable under sections 169 and 465, &c., of the Penal Code, and I should have thought were tolerably well known to be serious offences. Ram Soonder bought the estate in his own name, and is said to have immediately sold it to its original proprietor by deed of sale; so there is a good reason to suppose that his object all through was not merely to annex a paltry Rs. 16, but to obtain a valuable hold on the land. Section 15 of Regulation II of 1793 makes an estate sold by a public officer in this way, a forfeit to Government, and Ram Soonder bidding in his own name in the Collector's presence was only in keeping with his *sany froid* throughout the whole transaction. The two men who have been convicted are shewn to have acted together and acted together; Durga Churn appears not to have had any hand in the embezzlement, though it is hard to say that any one in the Treasury did not know of it. The plea of press of work is alleged as the cause of the default, but though there often is a press of work on latbandi duties, it does not appear to have been any worth mentioning one. If there had been so, the Treasurer and the 3rd Podda Churn, would have been actively employed with the two who are convicted, in receiving the payments, inasmuch as receiving the land revenue is their first and foremost duty. The Treasurer allowed Ram Soonder to write the Cash

which is no part of his regular duties, and he says Durga Churn was employed on stamp work, which is very secondary matter, and could be postponed to almost any time. The number of transactions also shows that there was no serious press of work, even if such an excuse were of the slightest value, which it is not.

The only thing I can do is, to refer the case to the High Court under section 296, with a view to quashing the conviction.

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DER PODDAR.
—
Judgment.

The following judgment was delivered by the High Court (1) :—

We annul the trial held by the Deputy Magistrate Anwar-uddeen Ahmed, and order that a new trial be held before the Court of Session, and that proceedings be taken to commit the prisoners for trial under section 409 of the Indian Penal Code accordingly.

Section 409 does not, as supposed by the Deputy Magistrate, require the property, in respect of which criminal breach of trust is committed, to be the property of Government, but only requires that it shall be entrusted to a public servant in his capacity as such public servant.

The Deputy Magistrate's view of the punishment proportionate to the offence leaves altogether unnoticed the fact that one of the accused appears to have deliberately embezzled this money, as a means of depriving another person of his property, and of himself acquiring it as purchaser at a revenue sale, which is a very serious aggravation of the offence of criminal breach of trust.

(1) AINSLIE and BROUGHTON, J.J.

[EXTRAORDINARY CRIMINAL JURISDICTION.]

1878
June 18.

IN THE MATTER OF HURREE NARAIN MOOKERJEE.

Section 263, Code of Criminal Procedure—Verdict of Jury—Case referred to Sessions Judge—Practice of the High Court.

Where there are reasons sufficient to warrant a Jury in disbelieving the witnesses and in giving the prisoner the benefit of the doubt raised by inconsistencies in that evidence, although another Jury might have come to a different conclusion, the High Court will not interfere. It must be shown that the verdict of the Jury is certainly unreasonable and perverse.

The Queen vs. Sham Bagdee and others, 20 W. R., 73, cited and followed.

CASE referred under section 263 of the Code of Criminal Procedure, by the Sessions Judge of Moorshedabad, because he disagreed with the unanimous verdict of a Jury acquitting the prisoner, considered it to be necessary for the ends of justice to send the case for the orders of the High Court.

Baboo Jugdanund Mookerjee (Junior Government Pleader), Government.

Baboo Nilmadhub Bose, for the Prisoner.

The facts will sufficiently appear from the judgment of the High Court (1) which was delivered by

AINSLIE, J. AINSLIE, J. :—

This case has been referred to us by the Sessions Judge of Moorshedabad, under section 263 of the Criminal Procedure Code.

The prisoner is charged under sections 468, 469 and 471 of the Indian Penal Code—the substance of the charges being that he had fabricated certain letters purporting to have been written by Kally Krishto Chatterjee, the Head Clerk in the Collector's Office, about an application made for an appointment by Rameshwar on behalf of Bhugwan Biswas. The Jury unanimously found the prisoner "not guilty." The Judge being of a different opinion has referred the case to this Court.

(1) AINSLIE and BROUGHTON, J.J.

The case for the prosecution rests mainly on the evidence of Meshur, Bhugwan, Soorao Bewah and one Ramakunt, in addition to which there is evidence, identifying the writing of two of the letters marked "A" and "B," respectively, as being the handwriting of the prisoner. On going through the evidence of the witnesses, it is clear that in several parts it is not consistent, and that the witnesses probably have not been speaking the simple truth.

In the case reported in 20 Weekly Reporter, page 78, Criminal Appeals, Mr. Justice MACPHERSON, speaking of a reference under the same section, says: "If we are to interfere in every case of doubt, in every case in which it may with propriety be said that the evidence would have warranted a different verdict, then we must hold that a real trial by Jury is absolutely at an end, and that the verdict of a Jury is of no more weight than the opinion of assessors. I presume that if this were the intention of the Legislature, it would have said so; but the Legislature has not said so."

In this case it may be that another Jury would have come to a different conclusion on the evidence; but at the same time there is no doubt that there are reasons for suspicion sufficient to warrant a Jury in disbelieving the witnesses in the present case, and in giving the prisoner the benefit of the doubts raised by inconsistencies in their evidence. This is not a case in which we can say that the verdict of the Jury is certainly unreasonable and perverse. Therefore, it seems to me that, following the general practice of the Court, we ought not to interfere.

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NARAIN MOO-
KESJEA.
Judgment.
AINSLIE, J.

[CRIMINAL REFERENCE.]

1876
June 2.IN THE MATTER OF THE EMPRESS vs. THE MUNICIPAL
COMMISSIONERS OF CALCUTTA.

*Public Servant—Municipal Corporation—Public Nuisance—Corporation
Calcutta—Indian Penal Code, section 21—Presidency Magistrates' Act
IV of 1877, section 39—Act IV (B.C.) of 1876.*

The protection extended by section 39 of Act IV of 1877, 'Presidency Magistrates' Act,' to certain individual public servants, does not extend to a Municipal Corporation prosecuted under the Indian Penal Code for being guilty of a public nuisance.

Per AIRSIDE J.—The right to prosecute any person or class of persons by whom any one may have been injured is a common law right which can only be limited by special legislation. Such a right can be taken away unless by express words or by necessary implication.

Per WHITE J.—It is doubtful whether a Corporation is a public servant at all: but assuming it is, neither the Corporation of Calcutta nor any of its members is a public servant removable by Government.

Where a privilege is created in favour of certain persons, the meaning of the words creating the privilege should not be extended beyond their plain and natural sense.

Indian Penal Code, section 21; Presidency Magistrates' Act, section 39; Act IV (B.C.) of 1876, discussed. *R. vs. Birmingham and Gloucester Railway*, 3 Q. B. Rep., 223; *R. vs. Scott*, 3 idem, 50; *R. vs. The Great Northern of England Railway*, 9 idem, 100, cited.

REFERENCE under section 240 of the Presidency Magistrates' Act from the Officiating Chief Magistrate of Calcutta, the result of which are as follows:—

"Section 39 of Act IV of 1877 provides that no public servant who is not removable from his office without the sanction of Government shall be prosecuted for any act purporting to be done by him in the discharge of his duty without the sanction of Government. Does this protection extend equally to a Municipal Corporation prosecuted under the Indian Penal Code for being guilty of a public nuisance? The illustration to

of the Indian Penal Code declares that a Municipal Commissioner is a public servant, and under section 11 of the same Code the word "person" is said to include a body of persons, so that a Corporation may be indicted for a public nuisance. It seems to me that a Municipal Corporation is entitled as a body to the same privileges as the individual Municipal Commissioners who compose it, and all the more so as such a Corporation is liable to be sued under the Indian Penal Code. If this view of the case is correct, it would seem to follow that the protection afforded by section 39 of Act IV of 1877 is a privilege enjoyed by Municipal Commissioners appointed by Government. It may not be out of place here to draw attention to the fact that the law contained in section 39 of Act IV of 1877, and in section 466 of the present Code of Criminal Procedure, is more stringent than that contained in section 167 of the repealed Procedure Code Act XXV of 1851."

Phillips, and *Gasper*, for the Prosecution.

Piffard, for the Municipal Commissioners.

The following judgments were delivered by the Court (1) :—

AINSLIE, J. :—

The question referred by the Presidency Magistrate is, whether the protection extended by section 39 of Act IV of 1877 to individual public servants, extends equally to a Municipal Corporation prosecuted under the Indian Penal Code for being guilty of a public nuisance. By section 11 of the Penal Code the word "person" is defined to include a body of persons whether incorporated or not; and therefore the word person in section 21 may be read as a body of persons incorporated. The word "public servant" in that section may consequently denote a body of persons incorporated, falling under any of the descriptions given therein. It is not necessary to refer to any except the 10th. The illustration in the 10th description says, that a Municipal Commissioner is a public servant. But it does not follow that a Corporation, such as that created by Act

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(1) *AINSLIE and WHITE, J.J.*

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IV (B.C.) of 1876, is also a public servant within the meaning of that section.

The words "every officer" in the 10th description seem rather to point to an individual than to an incorporated body; but assuming for the purposes of this reference that the Municipal Corporation of Calcutta is a public servant within the meaning of section 21 of the Penal Code, still it seems to me that it does not come within the provisions of section 39 of the Presidency Magistrates' Act.

By that Act, no such Judge or public servant, as is described in that section, shall, unless with the previous sanction of Government, be prosecuted for any act purporting to be done by him in the discharge of his duty. The class of public servants referred to consists of those who are "not removable from office without the sanction of Government." It appears to me that this description must be read in its entirety, and that the words "not removable from office" cannot be separated from the following words, "without the sanction of Government." But if the words be read as describing the class exempted from prosecution, even with the previous sanction of Government, the description can only be applied to a class not removable from office at all; dropping the words "without the sanction of Government," which have no meaning as applied to such public servants.

The right to prosecute any person or body of persons whom one may have been injured is a common right which can only be limited by special legislation; and in considering whether the right has been taken away, we must see that it is taken away by express words or by necessary implication.

It does not seem to me that it must necessarily be implied by the words "not removable from office without the sanction of Government," it was the intention of the Legislature to include those who are not removable from office under any circumstances at all. I see no reason to suppose that the Government must have meant to extend the same protection to a body such as the Municipal Corporation of Calcutta, which cannot be taken under a warrant or sentenced to imprisonment, which it thought fit to extend to certain individuals in the service of that Corporation, who no doubt are protected by section 33 of the Calcutta

municipal Act, and section 39 of the Presidency Magistrates'

The answer which I would, therefore, give to the question
 asked to us by the Magistrate is, that the protection does not
 extend to a Municipal Corporation prosecuted under the Indian
 Penal Code.

WHITE, J. :—

I am of the same opinion. The question submitted to us by
 the Presidency Magistrate turns entirely upon the meaning and
 construction of section 39 of the Presidency Magistrates'

It is not disputed, nor could it be disputed, that, unless
 section 39 applies to the Corporation of the Town of Calcutta,
 the Corporation is liable under the Penal Code to be prosecuted for a nuisance
 in the same way as if the offence had been committed by an
 individual. A Corporation may be proceeded against
 criminally as well for a misfeasance as for a nonfeasance. *Reg.
 v. The Birmingham and Gloucester Railway Co.*, 3 Q. B. Rep.
Reg. v. Scott, 8 ditto, 547; and *Reg. v. The Great North-
 ern Railway Co.*, 9 ditto, 315.

Section 39, as regards a Judge or any public servant not
 removable from office without the sanction of the Government,
 protects them from prosecution for an offence, except with the pre-
 vious sanction of the Government. Government, as used in the
 section, means the Government acting in its executive capacity. It
 is contended that the Calcutta Corporation falls within the category
 of a public servant not removable without the sanction of the
 Government. I think it is open to much doubt whether the
 Corporation, as distinct from its individual members, is a public
 servant at all, as these words are defined by the 21st section of
 the Penal Code which is incorporated with the 39th section
 of the Act under consideration. Assuming, however, for the
 sake of the argument that that point is decided in favour of
 the defendants' contention, it seems to me clear that the Calcutta
 Corporation does not come within the description of a public
 servant not irremovable from office without the sanction of Govern-

The Corporation is created by Act IV (B.C.) of 1876.
 The 4th section of that Act certain persons, to the number of
 twenty-two, who are styled Commissioners, and of whom forty-

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eight are elected by the rate-payers, and twenty-four appointed by the Government, are incorporated by the name of the Corporation of the Town of Calcutta.

The Corporation is to have perpetual succession, a common seal, and by its corporate name to sue and be sued. There is no provision in the Act for putting an end to the Corporation, or for removing or dismissing it, either with or without the sanction of Government, which means, as I have said, the executive Government. It can only cease to exist by an Act of the Legislature, and until and unless the Legislature interferes its corporate life must continue. The words "public servant not removable without the sanction of Government" are wholly inappropriate to describe the legal position of such a corporation.

Again, if it were necessary to go beyond the Corporation and consider the position of the seventy-two members comprising it, they appear to be equally without the particular description of public servant mentioned in section 39 of the Presidency Magistrates' Act. By section 22, they are elected for a term of three years, and continue in office during that term. Section 23 enumerates the circumstances under which, and the only circumstances under which, they cease to be members of the Corporation. Those circumstances are death, resignation, or disqualification, the disqualification being that which may arise from their becoming bankrupt, or interested in a contract with the Corporation, or being absent from Calcutta for six consecutive months, or being sentenced to a term of imprisonment. So that, looking behind the Corporation, if I may so say, to the members who constitute it, it cannot be said of them any more than of the Corporation that they are persons who are not removable without the sanction of Government.

Mr. Piffard has argued that the words in section 39, which we are now considering, are intended to embrace two classes of public servants; first those who are not removable from office at all; and, secondly, those who are removable only with the sanction of Government. But I am unable to agree with him that this is the true construction of the words in question. They appear to me to point to one class, and one class only, of public servant.

t, that class which is removable only with the sanction of Government. The words are satisfied by applying them to that class, and where, as here, a privilege is created in favour of certain persons, the meaning of the words creating the privilege could not be extended beyond their plain and natural sense.

Piffard's contention would require us to construe the section if its language had been, "any public servant not removable from his office, or if removable not removable without the sanction of Government." In fact, to warrant the construction intended for, some additional words would have to be introduced, and this circumstance, I think, is fatal to the argument.

I agree with my brother AINSLIE, that if we look to the reason for the privilege conferred by the 39th section, there is a marked distinction between the case of a public servant, whose removal required the sanction of Government, and that of a corporation in the position of the Calcutta Municipality. The Government may have an interest in protecting the former from prosecution without their previous sanction, but no interest in protecting the latter from the consequences of their own acts. Moreover, the corporation, if convicted, cannot be punished by imprisonment, only by fine. The Legislature must have thought it a matter of importance that no public servant whose removal requires the sanction of Government should be subjected to imprisonment without its sanction; but the same reasons for requiring Government sanction do not apply, when the result would be only the infliction of a fine which must ultimately be paid by the rate-payers of the Town of Calcutta. I concur, therefore, in the opinion, that the question which has been submitted to us by the Presidency Magistrate must be answered in the nega-

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WHITE, J.

[CIVIL REFERENCE.]

1875
July 24.

PANDUB GAZI PETITIONER;

AND

JENNUDDI AND OTHERS OPPOSITE PARTIES.

Growing Crops—Moveable property—Registration Acts.

The definition of moveable property given in the Registration Acts is expressly given for the purposes of those Acts solely, and ought not to be extended.

Standing crops are not moveable property, within the provisions of Acts X and XV of 1877, and a suit for wrongfully taking and carrying them away will be governed by Art. 36, Sch. II, Act XV of 1877.

Raj Chander Bose vs. Dharm Chander Bose, 8 B. L. R., 510; *Nuttu Meah vs. Nand Ram*, id., 508; *Tufail Ahmed vs. Baney Madhub Mookerjee*, 24 W. R., 394, cited and followed.

REFERENCE under section 617 of the new Code of Civil Procedure from the Moonsiff of Commillah, the terms of which are as follows :—

This is an application for review of judgment of this Court, (exercising jurisdiction under section 29, Act VI of 1871,) passed on the 21st January 1877. The action which was for the recovery of compensation for crops alleged to have been wrongfully taken and carried away by the defendants on the 10th and 11th Pous 1285 Tripura, corresponding with the 24th and 25th December 1875, was instituted on the 22nd December 1877, and was dismissed as barred by Art. 36, Sch. III, of Act IX of 1871. The grounds now urged for the admission of a review are; *firstly*, that standing crops are not moveable property, and, *secondly*, supposing that they are moveable property, still the action is governed by Art. 49, Sch. II, of Act XV of 1877.

In support of the first contention, the petitioner's pleader refers this Court to the case of *Tufail Ahmed vs. Baney Madhub Mookerjee*, reported in 24 W. R., 394. Although an inference in support of the contention may be drawn from the words of the learned Chief Justice, still, as I apprehend, the rule contended for is not broadly laid down there. The petitioner's pleader also refers to the case of *Okondhuri Roshan Ali*, 4 Agra Reports 157, but with all deference to the Judge who decided the case alluded to, I cannot rely on it alone in face of the positive provisions of Act IX of 1871. It is to be observed that the definition given of moveable property in Act III of 1877 is a reproduction of what was given in Act XX of 1871.

and it is to be presumed, therefore, that the Indian Legislature had in view the union expressed by the late Chief Justice in his judgment in the case of *Attor Meah vs. Nand Ram*, 8 B. L. R., 520. I think that the Legislature, wisely and with the object of avoiding the anomaly that would otherwise exist, classed growing crops in the same category as crops severed or cut. Hence, adopting the definition given in Act III of 1877, I consider the first ground to be untenable.

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As regards the second ground, I wish to remark that evidently the right of action was barred by limitation under Art. 26, Sch. II, of Act IX of 1871, which was in force up to the 30th September 1877. But if it be held that the right of action revived on the 1st October 1877 by the enactment of the new Law, Art. 49, Sch. II, of Act XV of 1877, I shall be bound to admit the review. The contention of the petitioner's pleader seems supported by the views expressed by HOLLOWAY, J., in the case of *Vallia Jambiah vs. Vira Ramu*, I. L. R., 1 Madras, 228; but it is to be remembered that there is no ruling of the Calcutta High Court either way so far as this peculiar question is concerned. The absence of authority directly bearing on the point, as well as the importance of the question raised, render it desirable that it be conclusively settled. I, therefore, submit the question for the decision of the Hon'ble High Court.

As however petitioner's pleader presses me to refer both the questions, I humbly solicit the Honorable Court's opinion on the following :—(1.) Whether standing crops are not moveable property under Acts X and XV of 1877? Whether section 49 of the present law revives and saves petitioner's right of action from the operation of limitation?

The judgment of the High Court (1) on the reference submitted is as follows :—

In this case the Sudder Moonsiff of Commillah, exercising the powers of a Small Cause Court Judge, under section 29, Act VI of 1871, has referred the following questions for the opinion of the Court :—(1). Whether standing crops are not moveable property under Acts X and XV of 1877? (2.) Whether section 49 of the present law revives and saves plaintiff's right of action from the operation of limitation?

The facts out of which the questions of law arise are these : The plaintiff in this suit sought to recover damages from the defendants, who, on the 24th and 25th of December 1875, wrongfully carried away standing crops belonging to him. The suit was brought on the 22nd December 1877, that is, within two

(1) MITTER and MACLEAN, J.J.

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years from the date of the cause of action. The Moonsiff missed the suit as barred by limitation under the provisions of Article 26, Schedule II, of Act IX of 1871, holding that standing crops are moveable property. An application for review of the judgment of the Moonsiff has been made upon two grounds. *Firstly*, that standing crops are not moveable property; *secondly*, that even if they are moveable property, the suit is barred by limitation under the provisions of Article 49 of Schedule II of the new Limitation Act, viz., Act XV of 1877. It was the law in force at the time when the suit was instituted. The Moonsiff's opinion upon these two questions is against the plaintiff. He thinks that standing crops are moveable property because they come within the definition of moveable property as given in the Registration Laws, viz., Act XV of 1866 and Act III of 1877. On this ground alone he is inclined to decide the question against the plaintiff's contention, although that contention is supported by direct authorities, all of which seem to have been cited in argument before him.

We are of opinion that the definition given in the Registration Acts is expressly given for the purposes of those Acts, and is not to govern the decision of the question raised in this case. Following the principle of distinction between moveable and immovable properties as laid down in *Raj Chunder Dharma Chunder Bose*, 8 B. L. R., 510, and *Nuttoo and others vs. Nand Ram*, p. 508 of the same volume, and directly upon the point in *Tofail Ahmed vs. Banoo Mookerjee*, 24 W. R., 394, we think that standing crops are moveable property. Consequently, supposing the Limitation Act of 1871 was applicable to this case, the Moonsiff was in error in applying Article 26 of the second Schedule of that Act. We think that Article No. 40 was applicable. Therefore the remedy of the plaintiff was not barred when the new Limitation Act came into operation. This being so, the second question referred does not arise. The Moonsiff ought, therefore, to have decided the question of limitation in this case with reference to Act XV of 1877; and under Article 36 of that Act the suit is not barred.

[PRIVY COUNCIL.]

ORAB ALLY KHAN PLAINTIFF ;
AND
BDOOL AZEEZ AND AHMEDOOLLAH . . DEFENDANTS.

1878
 April 13.

*Sheriff's Sale—Property without Jurisdiction—Warranty—Fieri facias—
 Failure of consideration—Remedy of Purchaser—Execution of writ
 without Jurisdiction.*

The purchaser, at a sale by the Sheriff under a writ of *feri facias*, upon being evicted by the execution-debtor, may recover the purchase-money which he has paid, from the execution-creditor, if it should turn out that the Sheriff had no authority to execute the writ at the place where the property was situate, and that he did so execute it under the authority, and by the express direction, of the judgment-creditors.

Where a Sheriff seizes and sells property under a writ of *feri facias* he may be held to undertake by his conduct that he had jurisdiction to do so; although, when he has jurisdiction, he does not in any way warrant that the judgment-debtor had a good title to the property, nor guarantee that the purchaser shall not be turned out of possession by some person other than the judgment-debtor.

When property has been sold under a regular execution, and the purchaser is evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor; because the Sheriff is authorized by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

Where the Sheriff acts *ultra vires* he cannot invoke the protection which the law gives him when acting within his jurisdiction. He is in the position of an ordinary person who has sold that which he had no title to sell; and, in India, his responsibility in respect of the sale must be governed by the law relating to the sale of chattels rather than by that relating to the sale of real estate.

Sims vs. Marryat, 17 Q. B., 281; *Eichholz vs. Bannister*, 34 Law Jour. C. P., 105, 17 C. B. (N. S.) 708; *Chapman vs. Spiller*, 14 Q. B., 621; *Hell vs. Conder*, 2 C. P. (N. S.) 22; cited and discussed.

APPEAL from a decision of the High Court of Judicature, appeal from a judgment of Mr. Justice PHEAR, which will be reported in I. L. R., 1 Cal., 55. The facts are sufficiently

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set forth there, and in the judgment of their Lordship Privy Council (1), which is as follows :—

This is an appeal against a decree of the High Court cutta, sitting as a Court of Appeal, which, on the 23rd 1875, affirmed the judgment of Mr. Justice PHEAR, who exercise of the original civil jurisdiction of the same Court on the 22nd April 1875, dismissed the appellant's costs.

The suit was instituted in December 1872, by the suing as executor of one Dianut-ut-Dowlah, against Moheesooddeen, who died after leave to appeal had been in India, and is represented by the present respondent. The case was tried in India upon only the first and principal issue, viz., whether or not a good cause of action was in the plaint. It is, however, conceded that the statement of the plaint may be taken to be supplemented by, and to any fact stated, or to be inferred by necessary implication from the written statement of the plaintiff, or the documents to and filed with either that or the plaint itself. The Sheriff's bill of sale of the 9th October 1866 : A bill of Dianut-ut-Dowlah to the Judicial Commissioner of the order thereon ; the will of Dianut-ut-Dowlah and the certificate granted to the plaintiff as the executor named therein ; the writ of *fieri facias* dated the 18th June 1866 ; and the order of the attorney to confess judgment in the action in which the writ was issued. For the trial of the issue, which is in the nature of a trial on demurrer, the facts stated or to be implied from the statement mentioned must be taken to be true.

What, then, are those facts ? Taken in chronological order they are as follows : In 1856, under the before-mentioned warrant-of-attorney, judgment was entered up in the Supreme Court of Judicature at Fort William, at the instance of Khajah Moheesooddeen (the defendant in this action) against Robert O'Dowda, who was only joined with him as co-defendant in order to give the Court jurisdiction, against Wazeer Khan Abdool Samant, for the purpose of securing the repayment of a loan.

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MORRIS SMITH, and Sir ROBERT P. COLLIER.

Rs. 70,000, with interest, on the 23rd July 1856. In order to enforce this judgment against Khajah Abdoos Samut and the representatives of Wazeer Khan, who was then dead, a writ of *fiery facias* was, on the 18th June 1866, directed to the Sheriff of Calcutta, commanding him to cause to be levied and sale of the houses, lands, debts, and other effects, moveable and immoveable, of the said defendants, within the provinces, districts, and countries of Bengal, Behar, and Orissa, or in the province or district of Benares, or in any other factories, districts, and places which then were annexed to and made subject to the Presidency of Fort William in Bengal, by seizure, and if necessary by sale thereof, a certain sum therein mentioned. The plaintiff alleged that this writ did not legally authorize the levy of the sum in the writ mentioned by the seizure and sale of moveable properties in Oudh, but that, nevertheless, the Sheriff, by the authority of Khajah Moheesooddeen, the execution-creditor, and on the express instructions of his Attorney, and promising to act under and by virtue of the said writ, on the 2nd and 20th days of August 1866, seized the right, title, and interest of Abdoos Samut and of Wazeer Khan, then in the possession of his heirs and representatives in a talook, and premises situate in the Province of Oudh, and put the property so seized for sale on the 4th October in the same year; that Dianut-ut-Dowlah became the purchaser of it for the sum of Rs. 26,000; that the Sheriff afterwards executed to him the bill of sale of 9th October 1866, which is annexed to the plaint. The plaintiff further alleged that before the execution of the bill of sale, Dianut-ut-Dowlah paid the purchase-money to the Sheriff, who, on the 12th October 1866, paid Rs. 5,000, part thereof, to the Attorney of the plaintiffs in the suit; and on the 25th October 1867, paid the balance of the purchase-money, less his charges and charges, to Moheesooddeen himself; that the Sheriff, by his officer, put Dianut-ut-Dowlah into possession of the property, but that such delivery of possession was not legal and operative by the law then in force in Oudh; and that by that the sale was wholly inoperative, and did not pass the right, title, and interest of the judgment-debtors or of any other person than Dianut-ut-Dowlah; that afterwards, and after and under some

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proceedings which took place in the Courts of Oudh (the nature whereof, except that they began with a proceeding instituted by Dianut-ut-Dowlah himself for a partition, does not very clearly appear), the sale was pronounced null and void; and that thereupon and in the month of August 1868, Dianut-ut-Dowlah was removed from possession of the talook and premises. The plaintiff then admitted that Dianut-ut-Dowlah, whilst in possession, had made collections to the amount of Rs. 10,937, but alleged that after payment of Government revenue, collection, and law charges, and other necessary outgoings, a balance of only Rs. 446-6-9 remained in his hands, and that such balance was the only profit, benefit, or advantage which he obtained from the purchase, and then, after stating the death of Dianut-ut-Dowlah on the 23rd June 1868, the title of the plaintiff as his executor, a demand by the plaintiff and a refusal by the defendant, the plaint goes on to say: "The plaintiff sues the defendant for the sum of Rs. 26,000 for monies had and received by the defendant for the use of the said Dianut-ut-Dowlah."

Mr. Justice PHEAR, in the course of his judgment, made some attempt to support the regularity of the seizure and sale of the property under the writ of *feri facias*. In their Lordships' opinion the decree under appeal cannot be supported upon any such ground. The illegality of these proceedings is sufficiently alleged, and the objection to them is patent on the face of the plaint. The jurisdiction of the late Supreme Court, and of the Sheriff as its Officer, was originally limited, by the Charter of Justice of 1774, to the provinces of Bengal, Behar, and Orissa, and, though afterwards extended by the 39 and 40 Geo. III., Cap. 79, sec. 1, was so extended only to the province or district of Benares, and to and over all such provinces and districts as might, at any time thereafter, be annexed to and made subject to the Presidency of Fort William. The writ of *feri facias*, which was the Sheriff's authority for the seizure, was carefully framed in accordance with this definition of his jurisdiction. If, therefore, he seized property in any place which did not form part of, and had not been annexed to, the Presidency of Fort William, he was as much a trespasser as an English Sheriff who had seized property out of his bailiwick would be. That the province of Oudh was

ot, when first annexed to British India, or at the date of the
 cecution, annexed to the Presidency of Fort William, if not one
 those historical facts of which the Courts of India are
 und, under "the Indian Evidence Act, 1872," to take judicial
 istance, was at least an issue to be tried in the cause.

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The question to be determined was, however, correctly stated
 the judgment of the High Court on the appeal. After
 ating that they must assume it as established that the Sheriff
 d no right to execute the writ upon property in Oudh, and
 so, though that was not so clearly stated in the plaint as it
 ight be, that the result of the proceedings before the Commis-
 sioner of Oudh was that the sale was declared null and void, and
 at the plaintiff's testator was thereupon evicted from the pro-
 perty, the learned Judges said: "The question then arises, can
 a purchaser, at a sale by the Sheriff under a writ of *feri facias*,
 on being evicted by the execution-debtor, recover the purchase-
 money which he has paid from the execution-creditor, if it should
 turn out that the Sheriff had no authority to execute the writ
 at the place where the property was situate?" If that sentence
 stood alone, their Lordships think it would have required to
 be modified by the addition of some such words as "and that he
 so execute it under the authority, and by the express direction,
 of the judgment-creditor." They understand, however, that
 modification to be implied in the next sentence of the judgment,
 which is in these words: "We are asked by the appellant to
 consider and decide the case upon the assumption that the Sheriff
 in buying, selling, and conveying the property, was the agent of
 the execution-creditor; that the execution-creditor was in fact
 the vendor, and as he had no right whatever to deal with or
 dispose of the property, there was a total failure of consideration, and
 consequently the money paid to him for the purchase be-
 came money had and received to the use of the plaintiff's
 testator." This assumption seems to be amply justified by the
 fifth paragraph of the plaintiff's written statement at page 16
 of the record, and the letter therein set forth. The question thus
 presented is passed, and not without difficulty.

Their Lordships propose to consider: first, whether, in the

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circumstances stated, the evicted purchaser can have any remedy against the execution-creditor.

There is no doubt that the authorities cited in the judgment of the High Court, and relied upon at the Bar, establish the proposition which is thus stated by Lord St. LEONARDS, at page 519 of the 14th edition of his work on vendors and purchasers, "If the conveyance had been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase money either at law or in equity." This general rule seems by the law of England to govern all sales by private contract between the parties, either of a freehold or of a leasehold interest in land.

Does it, however, govern a case like the present, in which the sale, as regards the owner of the thing sold, is *in invitum*, and made under colour of legal process? The chief reasons for the rule are that the purchaser by private contract has full means of investigating the title of the vendor, and of either satisfying himself that it is good, or of protecting himself against any apparent or latent defect in it by proper and apparent covenants. If he fails to do either, his subsequent eviction is the result of his own negligence. But the purchaser at a Sheriff's sale has at best inadequate means of investigating the title of the judgment-debtor; all that is sold and bought is the right title, and interest of the judgment-debtor with all its defects; and the Sheriff, who sells and executes the bill of sale, is never called upon, and if called upon, would refuse to execute any covenant of title. Therefore, the reasons for the rule failing, the rule itself cannot properly be held applicable to sales by the Sheriff, which are governed by rules peculiar to such sales.

Now it is, of course, perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against the Sheriff or the judgment-creditor. This, however, is because the Sheriff is authorized by the writ to seize the property of the execution

debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting the title to be good.

The Sheriff, however, if he acts *ultra vires*, cannot invoke the protection which the law gives him when acting within his jurisdiction. He is in the position of an ordinary person who has sold that which he had no title to sell. And it appears to their Lordships that his responsibility in respect of the sale must be governed by the law relating to the sale of chattels, rather than by that relating to the sale of real estate. There is not in India the difference between real and personal estate which obtains in England; and moveable and immoveable property are alike capable of being seized and sold under a writ of *fiat*.

The law of England as to implied warranty of title in chattels had was, until lately, if it is not still, in some uncertainty. The more modern cases are collected by Mr. Benjamin in his work on Sales, 2nd edition, page 551 *et seq.* In *Sims vs. Marryat*, 17 Q. B., 11, Lord CAMPBELL, when commenting on Mr. Baron PARKER's judgment in *Morley vs. Attenborough*, after saying that the law was not in satisfactory state, observed: "It may be that the learned Baron is correct in saying that on a sale of personal property the maxim of *caveat emptor* does by the law of England apply, but if so, there are many exceptions stated in the judgment which well nigh eat up the rule."

One of the latest expositions of the law on this point is to be found in the case of *Eichholz vs. Bannister*, 34 Law Journal, C. P., 15, and 17 C. B. (N. S.), 708, which was decided in 1864. In that case Chief Justice ERLE is reported to have said: "I decide, in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale, either by words affirms that he is the owner, or by his conduct gives the purchaser to understand that he is such owner, then it forms part of the contract, and if it turns out in fact that he is not the owner, the consideration fails, and the money so paid by the purchaser can be recovered back." In the passage, it is to be observed, although contained in the report in the Law Journal, is not to be found *totidem verbis*, in the regular report. The actual decision, however, in which

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all Judges concurred, was that on the sale of goods in an open shop or warehouse there is an implied warranty on the part of the seller that he is the owner of the goods, and if it turns out otherwise, the buyer may recover back the price as money paid on a consideration that has failed.

A rule of this kind cannot, of course, be applied to a sale of goods by the Sheriff under a *fiat facias*, because what the Sheriff professes to sell is only the right, title, and interest, whatever that may be, of the judgment-debtor, and this was the express ground of the decision in *Chapman vs. Spiller*, 14 Q. B., 261, where the case is treated as an exception to the general rule. It would seem, however, that, even according to the principles laid down in *Morley vs. Attenborough*, 3 Exch., 500, which, of the modern cases, is the most favourable to the application of the maxim *caveat emptor*, the Sheriff may reasonably be held to undertake by his conduct that he is acting within his jurisdiction. In that case, though it was decided that on the sale by a pawn-broker of an article pawned with him as an unredeemed pledge there is no implied warranty of the pawnor's title, the judgment of Mr. Baron PARKE seems to assume that the pawn-broker does warrant that the article has been pledged with him, and has become irredeemable. The learned Judge says: "In our judgment it appears unreasonable to consider the pawn-broker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it." So, too, it may be inferred from *Hall vs. Conder*, 2 C. B. (N. S.), page 22, that, although upon the sale of a patent there is no implied warranty that the patent is valid and indefeasible, it would be reasonable to hold that there is an implied warranty that Letters Patent for the alleged invention have been regularly issued under the Great Seal. Their Lordships think that upon a similar principle the Sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction; although, when he has jurisdiction, he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment-debtor.

In the present case the subject-matter of the sale was the estate of the execution-debtor, so that if the Sheriff had had jurisdiction, his conveyance would have passed the title. It was solely because he was acting beyond his territorial jurisdiction that the sale became inoperative, and wholly ineffectual. The High Courts have assumed that if the defendant is to be treated as a principal in the transaction (and their Lordships think he ought to be so treated), the case must be governed by the ordinary rules relating to vendors and purchasers upon voluntary sales of immoveable property. This view does not appear to their Lordships to be correct. The defendant directed the Sheriff to sell in his character of Sheriff. He did not profess to sell, or could he have sold, as for himself. He intended the sale should be, as in fact it was, a sale by the Sheriff as Sheriff, and with the incidents attaching to such a sale. For the above reasons their Lordships are of opinion that the action cannot be properly determined without further investigation into the facts, as they cannot say that the plaintiff and the other documents on the record do not disclose a *prima facie* case for some relief against the defendant.

There is no doubt a further question, whether the plaintiff has shown a case which, if proved, would entitle him to recover the purchase-money as money had and received to his use upon a total failure of consideration. To that, their Lordships look the admitted fact of the possession by his testator for nearly two years of the property in question, and his perception, partial at least, of the rents and profits, might be a fatal objection. It could not, in such case, be said that the consideration was wholly failed. But it is not quite clear on the record that an objection arises, since if the sale has been treated as a sale, the purchaser has been accountable, and may have accounted for what he received, and in any case the Courts in India will be competent to mould the relief according to the facts fully established at the hearing. Their Lordships, of course, have no opinion whether the plaintiff will ultimately succeed in establishing his right to any relief. It may turn out that his testator, who never made any claim for the return of the purchase-money in his lifetime, bought with knowledge of the defects in

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the Sheriff's jurisdiction, or has, by acquiescence or in other way, forfeited any right which he might otherwise had to relief. They only decide that the plaintiff has not failed to disclose a good cause of action on the face of record; and that the cause ought to be tried upon the issues that have been, or may be, raised in it. And they accordingly advise Her Majesty to reverse the two decrees of the High Court, and to remand the cause for trial upon any issues settled or to be settled in the suit. They think that costs of both the parties to this appeal should be taxed, a certificate of their amount sent to the High Court, in order that they may hereafter be dealt with by that Court as regards the cause.

[CIVIL APPELLATE JURISDICTION.]

April 28. DURSUN SAHOO PLAINTIFF
 AND
 PRYAG RAM DEFENDANT

Joint Owners—Mortgagees—Fraud and Collusion—Case made in Court—Plaintiff changing his case—Special Appeal.

Each of two joint proprietors, A and B, separately mortgaged their share of the joint property to different persons. B's mortgagee, who was in time, obtained a decree on his bond, sold and purchased the house. In a subsequent suit for confirmation of right and possession by A's mortgagee, he charged that the other bond and decree were fraudulent and void, and that B had no interest in the property. All these allegations were found to be false by the lower Appellate Court. *Held*, in special appeal, that the plaintiff could not recede from the case he had made in the lower Courts and claim to be entitled to a decree for A's interest in the house.

SPECIAL APPEAL from a decree, passed by the Subordinate Judge of Bhaugulpore, reversing that of the Moonsiff of Monghyr. Lekha Sahu and Gobind Sahu, father and son, were joint owners of a *pucca* house in Monghyr. On the 6th of November 1874, Gobind Sahu, the son, executed a mortgage of the house to Pryag Ram, who obtained a decree on his bond, in execution of which he became the purchaser of the house at a sale held on the 6th of November 1875.

On the 19th of November 1874, Lekha Sahu, the father, mortgaged the house to Dursun Sahu, who got a decree on his bond on the 15th of March 1876. Dursun having attached the property in execution of this decree, Pryag Ram intervened, and on the 3rd of June 1876 an order was passed releasing the house from attachment.

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Thereupon Dursun Sahu brought a regular suit against Pryag Ram, Gobind Sahu, and Lekha Sahu, alleging that the bond and decree obtained by Pryag Ram were collusive and fraudulent, that his bond and decree were *bona fide*, and that the house belonged to Lekha Sahu, the father, whose rights and interests have been purchased by him, the plaintiff.

Pryag Ram's bond was registered first. It did not appear at what time precisely each had filed his suit on his bond. The decrees obtained on the bonds were mortgage decrees. In the present suit plaintiff got a decree in the Court of First Instance which was reversed on appeal. He then brought this special appeal.

Baboo Mohini Mohun Roy and Moonshee Mahomed Yusoof, for Appellant.

Mr. M. L. Saadel, for Respondent.

The judgment of the High Court (1) was delivered by

JACKSON, J. :—

JACKSON, J.

The facts of the present case, and the course which the parties have respectively taken, illustrate very curiously the complicated transactions in which litigants in this country appear to delight, and also the very bad advice which they receive from their pleaders when they come into Court in order to the solution of the difficulties in which they find themselves placed. The plaintiff in this case lent money to Lekha Sahu on pledge of certain house property. Just eight days before this occurred, the first defendant Pryag had lent money upon pledge of the same property to Gobind, son of Lekha. Both mortgages were registered ;

(1) JACKSON and TOTTENHAM, J.J.

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 v.
 PRYAG RAM.
 Judgment.
 JACKSON, J.

that of the son being of a prior date was, of course, prior in point of registration. The plaintiff, however, was the first to bring a suit for the recovery of his money and for the enforcement of his lien, and he obtained a decree against Lekha alone. In seeking to execute that decree and sell the property pledged, he was opposed on the part of Gobind, and that claim was allowed. He then brought another suit in which he contended that Gobind had no right whatever, and that Lekha was the sole owner of the property pledged, but the Court in that suit held that, in point of fact, Lekha and Gobind were joint in dealings and jointly interested in the house, and that consequently no objection could be made to the sale of the house in execution of that decree, and that it ought to be sold. Meanwhile, Pryag had been suing the son Gobind, and obtained a decree against him, likewise with a declaration of his lien, and he caused the right, title and interest of Gobind, his judgment-debtor, in this property to be put up and sold, and he himself became the purchaser and got into possession. The present plaintiff on the same day pursued a parallel course, except that he put up to sale the right title and interest of Lekha in the same property, and in like manner himself became the purchaser. He now seeks under his purchase to obtain possession of the property and he maintains, as he has maintained throughout, that the real ownership and possession rested with the defendant, third party, viz. Lekha. He also sets out in his plaint that "your petitioner obtained a decree on the 20th August 1875 from this Court in the presence of the defendant, second party, declaring that the defendant, third party, was the real purchaser and occupant of the house in suit, while the defendant No. 2 was a mere nominal party."

The Moonsiff gave judgment in favour of the plaintiff, and that judgment has been set aside on appeal by the Subordinate Judge. He finds, contrary to the allegations of both parties, that the bond and decree in either case were *bona fide*, and that each of the parties, plaintiff and the first defendant, had actually lent money upon pledge of this property. But considering that the bond of the defendant, first party, was executed and registered before the execution of the plaintiff's bond, he held that it

defendant's purchase was entitled to precedence and preference, and therefore he threw out the plaintiff's suit.

Now it has been contended with much force before us in special appeal that the defendant Pryag, having deliberately brought his suit and sought relief against Gobind alone, and having, as purchaser at a sale, acquired the right, title and interest of Gobind only, is not entitled to fall back upon the equities which he might, if he had chosen, have set up in his suit, and claim now to have acquired the rights of Lekha also. It is admitted now that, so far as the rights of Gobind are concerned, Gobind being found to be a joint owner of the house, the defendant must succeed; but in regard to the rights of Lekha, the defendant not having as decree-holder sold them or himself purchased them, cannot resist the claim of the plaintiff as far as those rights are concerned, and the decision of the Judicial Committee, in the case of *Nogendra Chunder Ghose vs. Sreemutty Kaminee Dassee*, in 11 Moore's Indian Appeal Cases, is relied upon. In that case the circumstances were not similar to those of the present case. Their Lordships delivered a very guarded judgment, and they expressly say they could not, especially as the case was heard *ex-parte*, set aside the decision of the High Court, and in substance they only affirmed that "an action brought under section 9 of Act I of 1845 is only a personal action," and so forth. The fact was that the plaintiffs in that case had brought a suit to recover against a widow holding a widow's estate, certain moneys for which they were entitled to sue under section 9 of Act I of 1845, and it was pointed out that that section gave a personal remedy alone and did not provide a remedy against the land, and the view taken was that the plaintiffs by deliberately adopting that course had chosen to proceed against the widow personally, and could not be allowed to extend and enforce the personal decree so obtained against the possessor of a limited interest. The facts of this case are very different. The property in question belonged to two persons jointly. Each of the parties contending before us had lent money upon security. One dealt with the father, the other with the son. One relied apparently on the father's position as *karta* or the presumed *karta*, the other on the rights of the son as being the ostensible owner, because

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Judgment.

JACKSON, J.

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v.
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Judgment.
JACKSON, J.

in the document of title the son's name alone appeared. Each party believed and maintained that in bringing his suit and in causing the sale in the mode in which it was caused, he was pursuing the property. It was not a suit in either case of a strictly personal character, but a suit for enforcing a lien upon property. In this state of things, the defendant being prior in mortgage, and being now as purchaser in possession of the mortgagee's rights, and being also in possession of the property, has the plaintiff entitled himself equitably to obtain possession of the property or of any part of it? It seems to me that his conduct has not been such as to entitle him to the consideration. In the first place, he took a second mortgage, well knowing, or at least having the easiest means of knowing, that the other party had a prior mortgage quite recently effected. He then brings the present suit in which he really misrepresents the character of the previous proceedings. He does not say, "I have acted under a mistake and bought the rights of Lekha Sahu alone; the defendant has purchased those of Gobind Sahu, allow me to satisfy the defendant's mortgagee and to become the owner of the entire property." He chooses to say that Gobind Sahu had no right whatever in the property, that the whole transaction between him and Pryag was collusive and fraudulent, and that he was entitled over the heads of both of them to recover possession of the property. Considering how the suit has been framed, considering what the facts are, it appears to me that the plaintiff has made out no case, that the judgment of the lower Appellate Court was correct, and that this appeal must be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

URBAN CHUNDER GHOSE PLAINTIFF;

AND

TUTTY LALL GHOSE JAHIRA DEFENDANT.

1878
May 2.

*Suits for Arrears of Rent—Limitation—Rent Act VIII (B. C.) of 1869,
section 29—Act IX of 1871, Sch. II, Art. 110.*

Notwithstanding that rent suits are now triable by the Civil Courts and not by the Revenue Courts, and that a limitation for suits for arrears of rent is provided by Act IX of 1871, Sch. II., Art. 110, yet the general law of limitation is not extended to suits for arrears of rent; and in regard to these there is no provision relaxing the term within which they are to be brought under section 29, Act VIII (B. C.) of 1869.

On the last day allowed by Act VIII (B. C.) of 1869, section 29, for filing the plaint in a suit for arrears of rent, the Courts were closed, because it was a close holiday, and the plaint was presented on the next and first open day. *Held*, that the suit was barred by limitation.

Poulson vs. Modhu Sudan Paul, 2 W. R., 21, Act X Rulings, cited.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Nuddea, affirming that of the Moonsiff of Ranaghat.

Baboo Sharada Prosad Roy, for Appellant.

The Respondent did not appear.

The judgment of the High Court (1) is as follows:—

This is a suit for arrears of rent under Act VIII (B. C.) of 1869. It has been dismissed by the Court of First Instance as barred by limitation, and plaintiff's appeal having been dismissed, he has brought the matter before us in special appeal.

Section 29 of the present Rent Law declares that the recovery of "suits for arrears of rent shall be instituted within three years" from certain specified dates, and like Act X of 1869, which has replaced, contains no provisions for relaxing that term, such as are contained in the general law of limitation.

(1) MARKBY and PRINSEP, J.J.

1878

PURBAN
CHUNDER
GHOSH

v.

MUTTY LALL
GHOSH
JANTRA.

Judgment.

On the last day allowed for filing the plaint in the suit now before us, the Courts were closed, because it was a close holiday, and the plaint was presented on the next and first open day. Now, under the general law of limitation (Act IX of 1871), this would be allowed, as special provision is made for such a contingency, but the matter for consideration is whether that law applies to suits under the Rent Law, and whether the law of limitation for such suits is contained only in the Rent Law. That is the only point submitted to us on special appeal.

The judgment of the Full Bench in the case of *Poulson vs. Modhu Sudun Paul Chowdhry*, 2 W. R., Act X., 31, on which both the lower Courts have relied in dismissing this suit, has clearly laid down that the general law of limitation does not apply to rent suits under Act X of 1859, but it is argued before us that the terms of the general law of limitation are not now (Act IX of 1871) the same as they were then (Act XIV of 1859), and that the Rent Law of 1859 has also been replaced by Act VIII (B.C.) of 1869, which has made rent suits triable not by Revenue but by Civil Courts.

We may at once dismiss the objection arising out of any alteration of jurisdiction since that cannot affect the point in dispute, the terms of the two Rent Acts being similar in providing for limitation in suits for the recovery of arrears of rent; nor does the mere fact that limitation for arrears of rent is provided for in Sch. II, Art. 110, Act IX of 1871, in our opinion, affect the reasoning on which the judgment of the Full Bench proceeded. If it had been the intention of the Legislature to extend the general law of limitation to suits for the recovery of arrears of rent brought under Act VIII (B.C.) of 1869, we think that the provisions of this Rent Act, relating to limitation, would have been entered in the repealing schedule to the Act of 1871; as they are not so repealed they would seem to be saved by section 6 of that Act. We, therefore, think that this suit was rightly dismissed, because it was not brought strictly within the term of three years prescribed by section 29, Act VIII (B.C.) of 1869, and we dismiss this special appeal.

[CIVIL APPELLATE JURISDICTION.]

BHUGGOBUTTY KOWAR DECREE-HOLDER ;

AND

MONEY ASSIGNEE OF JUDGMENT-DEBTOR.

1878
May 15.

Party to the suit—Appeal—Act XXIII of 1861, section 11—Applications under section 15 of the High Courts Act—Delay.

A party who has been put upon the record, whether rightly or wrongly, is so far a party to the suit that he has a right of appeal under Act XXIII of 1861, section 11.

A party who prays for the interference of the High Court under section 15 of the High Court's Act, should do so without delay.

THIS was an application to the High Court under section 15 of the High Court's Act, praying that an order, passed by the Judge of Tirhoot refusing to entertain an appeal, might be set aside ; and that the Judge be directed to hear the appeal.

The facts of this case are as follows :—Mussamut Bhuggobutty was obtained a money-decree against one Mr. Macgregor as owner of certain factories. Alleging that Mr. Money had purchased the factories, she, on the 14th of June 1877, applied to the Judge of Tirhoot, (1) to have the name of Mr. Money entered on the record as judgment-debtor in the place of Mr. Macgregor ; (2) for issue of execution as against Mr. Money. The Judge granted her application, and made an order accordingly. Against this order Mr. Money preferred an appeal to the Judge of Tirhoot, who, on the 17th September 1877, held that no appeal. Mr. Money then applied to the High Court to have the order of the Judge set aside, and for a direction that the Judge should hear his appeal. A rule was issued, calling upon the opposite party to show cause why the application should not be granted. The matter having come on for hearing the following judgments were delivered by the Court (1) :—

(1) AINSLIE and BROUGHTON, J.J.

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AINSLIE, J. :—

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KOWAR
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MONEY.

Judgment.

Ainslie, J.

The proceedings of the Judge in the present case are not intelligible. I find that on the 14th of June 1877, the Subordinate Judge made an order whereby he substituted Mr. R. Money judgment-debtor on the record, and directed that execution proceedings should be taken as against him. From that order there was an appeal, and for the purposes of that appeal it is evident that Mr. Money was the judgment-debtor on the record; the Judge has apparently refused to recognize that order without formally setting it aside; and treating it as a nullity he has rejected the appeal as having been lodged by a person who has no right of appeal under section 11 of Act XXIII of 1861.

As I understand, no further proceedings have been taken in execution; and therefore it is not necessary at the present moment to determine the question raised. The petitioner having delayed so long in coming to this Court, he ought, it seems to me, to be left to such remedy as he can obtain in the Court below; I do not think that he has a complete remedy, because if at any time proceedings shall be taken in execution in any way affecting his interests and binding him, he will have a right, under the cancelled order of the 14th of June 1877, to appeal against those proceedings; and in that appeal he may again raise the question of the propriety of the order of the 14th of June. It is clear that, although the time required for obtaining a copy of the Judge's order may be allowed, the petitioner unnecessarily delayed two months and twenty-two days after he had obtained that order before making this application: and the explanation of that delay has been attempted. I would, in consequence of this delay, charge the rule with costs.

BROUGHTON, J.

BROUGHTON, J. :—

I think that a man whose name is on the record is a party to the suit, and therefore entitled to appeal, under section 11 of Act XXIII of 1861, even although he has been put on the record wrongly; because the question at that stage is not, whether he was rightly or wrongly put on the record, but whether he is really there. When his appeal is heard, then comes the question whether he was rightly or wrongly put on the record. If

show that he is not really liable in execution of the decree, because he was really not a party to the case, he will be entitled to succeed in the appeal. The preliminary objection, whether he is a party to the suit, and therefore entitled to appeal, is one which must be decided on the record as it stands.

I also agree with Mr. Justice AINSLIE in holding that this is not a case for interference under section 15 of the Charter Act, because there has been delay, and in the result that this rule should be discharged with costs.

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BRUGGO-
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v.
MONEY.

Judgment.

BROUGH-
TON, J.

[CIVIL APPELLATE JURISDICTION.]

MUSSAMUT RAM DOOLARY KOOER AND

ANOTHER PLAINTIFFS ;

AND

HACOOR ROY DEFENDANT.

June 3.

Zuripeshgi Mortgage—Registration—Valuation—Property worth less than Rs. 100—Registration Act, sect. 17, 49—Guardian—Minor—Suit by Guardian—Estoppel.

A mortgaged land to B by a deed of zuripeshgi to secure the repayment of Rs. 95. The rent was fixed by the deed at Rs. 6-12 per annum, and this rent the tenant was to retain as interest on the Rs. 95. The land was to be given up only on the event of the Rs. 95 being repaid. *Held*, that such a deed was admissible in evidence, as a lease, without being registered.

The guardian of a minor who has made a lease of the minor's property for good consideration, and who, ignoring the lease, sues to eject the lessee as a trespasser, will not be allowed to recover possession on the ground that the lease was void against the minor.

Durshan Singh vs. Hanmanta, I. L. R., 1 All., 374; *Rohines Debia vs. Shib Chunder Chatterjee*, 15 W. R., 558; *Ishan Chunder vs. Sooja Bebee*, 15 W. R., 331; *Moro Vitthal vs. Tukeram*, 5 Bom. A. C., 92; cited.

SPECIAL APPEAL from a decree passed by the Judge of Sahabad, reversing that of the Moonsiff of Arrah.

This was a suit for possession of land which had been settled orally by the plaintiff with the defendant, who is a non-cultivating ryot, from 1279 to 1283 F. The plaintiff alleged

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MUSAMMUT
RAM DOOLARY
KOOER
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DEFENDANT.

that the plaintiff demanded possession of the land on the expiration of 1383, but that the defendant refused to leave. The defendant alleged that on the expiration of the settlement in 1383, the plaintiff borrowed from him Rs. 95, for which she gave him a deed of *zuripeshgi*, the terms of which were that Rs. 6-12 per annum should be taken to be the rent of the *moonzah*, and that the defendant should retain that rent in lieu of interest on the Rs. 95, and that he should have power to keep possession of the land until the plaintiff should re-pay him. The deed was not registered.

It was proved that Musammut Ram Doolary Kooer had executed the deed as guardian of the minor. The plaint was filed on the 6th of November 1875, and was intituled a suit by "Musammut Ram Doolary Kooer, mother and guardian of Wujah Lall." The suit was not that of the minor suing by his next friend. The Court of First Instance gave plaintiff a decree, but this decision was reversed on appeal. The plaintiff then specially appealed on the ground that the *zuripeshgi* deed not being registered, was inoperative and inadmissible in evidence, and that no necessity having been proved to justify the mortgaging of the land for Rs. 95, the mortgage was invalid against the minor.

Baboo Prannath Pandit, for Appellants.

Baboo Doorga Pershad, for Respondent.

The following judgments were delivered by the Court (1):—

AINSLIE, J. AINSLIE, J. :—

The plaintiff in the present case sued for the recovery of possession of certain property, on the allegation that she had made a verbal settlement with the defendant; and that the term of the settlement having expired, she had given him notice to quit; but that he refused to do so, and was holding on without any right whatever. The defendant, in answer, put forward a document, dated the 27th of September 1876, which is called *zuripeshgee* lease. The first Court found that the document was genuine. The lower Appellate Court reversed that finding, and

(1) AINSLIE and WHITE, J.J.

came to the conclusion that the document was actually executed by the plaintiff. The Judge says that in the present case it is not necessary to consider how far the document may be binding upon the minor, as he will have an opportunity of challenging it when he becomes of age.

In this view we think that the Judge was right. If the plaintiff came into Court, on behalf of the minor, intending to raise the question of the binding effect of that document on the estate of the minor, she should have done so distinctly in her written statement. She ignored the existence of the document altogether, and it was only when it was put forward as an answer to the case set up by her that she wished to change the nature of her suit and raise the question as to the binding effect of the deed on the minor's estate.

The only question that remains is, whether this document is inadmissible in evidence, on the ground that it has not been registered, and that registration was compulsory.

This is an instrument by which possession of certain property was handed over by the plaintiff to the defendant as security for Rs. 95 lent to her. It states that the lessee shall pay what is called a rent of Rs. 8-12 every year in this way, *viz.*:—That Rs. 2 shall be paid into the Collector's treasury as the Government revenue of the property, and the remaining Rs. 6 odd annas shall be kept by the lessee in satisfaction of the interest accruing on the Rs. 95 advanced by him. It also states that the lessee is to have the whole of the profits in satisfaction of the interest. On condition whatever is made for the payment of the principal out of the usufruct. The document also recites that the defendant is to hold the property for four years certain, and that he is to continue in possession on the same terms so long as the money should not be paid.

It is contended that the interest ought to be added to the principal, and that if it is so added, the value of the interest in immoveable property passed by the instrument amounts to more than hundred rupees, and that registration was therefore necessary. The case cited in support of this view is reported in I. L. R., All., 274, *Darshan Singh vs. Hanmanta*. That is a case in which the suit was founded in a bond for Rs. 99, with interest

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Judgment.

AINSLIE, J.

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 LARY KOOR
 v.
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 ROY.

Judgment.

AINSLIE, J.

for three months at the rate of Rs. 2 per mensem, making a total of Rs. 105, which, as the Court says, was the least amount that could be recovered under the instrument. It was accordingly held there that the value of the property was over a hundred rupees.

Now, if the deed in the present case be looked at in the same way, it is quite clear that the amount claimed in any suit which could be brought on this bond, could not exceed Rs. 95, as the interest is to be paid as it accrues from the profits. Therefore if the same test as is applied by the Allahabad High Court be applied to the present case, it would appear that this bond did not require registration.

There is a case decided by this Court in 15 W. R., 558—*Hohinee Debia vs. Shib Chunder Chatterjee*, which shows that where the question is, whether the market value or the expressed value is to be taken to determine the necessity of registration, the Courts will not go beyond the value entered by the parties themselves in any particular instrument. There is another case at page 331 of the same volume—*Ishan Chunder vs. Sooja Beha*, which is more directly in point. In that case it appears that the instrument sued on, though in form a *zuripeshgee* lease for six years, was held to be a mortgage to secure re-payment of the sum of Rs. 99, and the Court decided that as such mortgage it created an interest of a value less than one hundred rupees.

There is a case cited by the appellant from 5 Bombay H. C. R., (A.C.), 92—*Moro Vitthal vs. Tukeram*. Under the Registration Act of 1864 a provision was made with reference to the Stamp Law for the purpose of determining the value of an interest created or transferred by an instrument. In the later Acts that provision has been omitted. If we are to look at the Stamp Act in the present case, we should have to hold that only the principal sum ought to be taken into account. The Bombay case was cited to show that we ought not to be guided by the provisions of the Stamp Act. In that case the question was,—whether a lease for six months certain, and to continue on for an indefinite period, was an instrument of lease for a period of more than one year, and, as such, one requiring

registration. The Court held that, though according to the Stamp Act it would require to be stamped as a lease for more than one year, yet for the purposes of the Registration Act it must be taken to be an instrument of which registration was not compulsory. The Court took the fixed term of six months as determining the question of the necessity of registration, or in other words, they determined that a favorable construction should be put on the Registration Act in any case of doubt, in order to give effect to the instrument. If we are to apply that rule to the present case, I think that we ought to hold that the words of the Act construed favorably to the validity of the instrument show that the value of the property must be taken to be that which the parties themselves agreed upon.

Under these circumstances, I think that the interest passed under this instrument ought to be valued for the purpose of determining the necessity of registration at Rs. 95; and, therefore, the Judge was not wrong in taking it into consideration as evidence in the case. In this view I would dismiss the appeal with costs.

WHITE, J. :—

I am of the same opinion on the merits of the appeal. I wish to say a word about the question raised on this Registration Act. The Registration Act makes registration compulsory where the interest in immoveable property, which is the subject of a conveyance, is of the value of a hundred rupees or upwards. In the present case the interest, which was acquired by the defendant under the usufructuary mortgage, was a right to hold this land for four years rent-free so far as the mortgagor was concerned, and, on the expiration of that period, if the Rs. 95 which were advanced at the time of the mortgage was not repaid, then to continue holding the land on the same terms until the Rs. 95 was repaid. The holding of the land by the defendant rent-free being treated as equivalent to and in lieu of the payment by the mortgagor of interest upon the Rs. 95.

The Legislature has laid down in the Registration Act no rule to guide us in coming to a conclusion as how an interest of this sort in land is to be valued, or how such an interest is to be

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Judgment
WHITE J.

estimated in money. Looking to the natural sense of the language used by the Registration Act, I should say that the value of the interest in the present case is what the possession of the property rent-free for four years is worth to the defendant. The parties have fixed the amount of rent which will thus come into the pocket of the defendant under the instrument at Rs. 6-12 per annum. The entire value thereof of four years possession would be Rs. 27, and the document would not require to be registered. On the principle recognized in the Bombay case, cited by my brother AINSLIE, I think the contingent circumstance that the defendant may continue to hold the land for more than four years unless the Rs. 95 is then paid off ought not to be taken into account in deciding what the value of the interest is for the purpose of registration. I feel some difficulty in treating the Rs. 95 as the value of the interest in the land in this case, when the Registration Act has laid down no rule on the subject, but left the Court to ascertain that value as best it may. If we are at liberty to look at the Stamp Act, and apply the rule there given for fixing the value of a usufructuary mortgage when possession is taken, there would be reason for holding Rs. 95 to be the value of the interest created by the present document. But I am not sure that we may look at the Stamp Act in solving the question before us. Whatever doubt I may have as to the mode of estimating the value of the defendant's interest in the property in dispute, I have no doubt that in the present case the value of the property is below a hundred rupees, and that the instrument, therefore, is one of which the registration is optional.

I therefore concur in the conclusion arrived at by my brother AINSLIE on this question as well as on the other questions raised by the appeal.

[CIVIL REFERENCE.]

IN re BAMA CHURN GHOSAL PETITIONER.

1878
June 24.*Act XX of 1865, sections 13 and 42—Penalty—Practising as Mookhtar—Mookhtar—Copy of Judgment—Stranger to suit.*

Quære—Whether an application by a person holding an *Am-mookhtar-nama*, but having no certificate, for a copy of the judgment in a suit in which neither himself nor his employer is a party, amounts to practising as a Mookhtar within the meaning of section 13, Act XX of 1865, so as to render the applicant liable to a fine under section 42 of that Act; supposing the application to have been made for and on behalf of the employer.

Strangers to a suit may obtain, as of course, copies of judgments, decrees, or orders, at any time after they have been passed or made.

APPLICATION to set aside an order passed by the Judge of Hooghly. The case is thus stated:—One Bama Churn Ghosal, who holds a general power-of-attorney from one Peary Mohun Mookerjee, applied on behalf of his employer to the Judge of Hooghly for an authenticated copy of the judgment in a suit in which his employer was not a party. The Judge finding that Bama Churn was neither a certificated Mookhtar or Pleader, nor a recognized agent within the meaning of section 37, Act VIII of 1859, held that he, in applying for a copy of the judgment, had "acted" in a Civil Court within the meaning of Act XX of 1865. The Judge, therefore, found him guilty of having contravened the provisions of section 13 of Act XX of 1865, and sentenced him to pay a fine of thirty-two rupees.

Bama Churn applied to this Court on the 5th to have the order of the Judge set aside. The record was called for, and on the 14th June instant, the Court (1) delivered the following judgment:—

MARKBY, J.:—

MARKBY, J.

In this case one Bama Churn Ghosal, who holds an *Am-mookhtar-nama* from Baboo Peary Mohun Mookerjee, applied on behalf

(1) MARKBY and PRINSEP, J.J.

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of his employer for a copy of the judgment in a suit. Baboo Penu Mohan Mookerjee was no party. Under a Order of this Court, dated the 2nd June 1875 (page 2 collection of Civil Circular Orders), a stranger to the court as of course copies of judgments, decrees, or orders after they have been passed or made. Therefore Penu Mohan Mookerjee was entitled to a copy of this judgment as of course, and if Bama Churn Ghosal had thought fit for a copy of this judgment on his own behalf, he could have obtained it.

The District Judge thought that because Bama Churn made this application on behalf of another person, he was not practising as a Mookhtar within the meaning of section 13 of Act XX of 1865, and as he held no certificate, the Judge inflicted upon him, under this Act, a fine of ten rupees. The matter has now come before us for revision under section 48 of the Act. We have had very considerable doubts having regard to the fact that Bama Churn Ghosal on matter of right, have obtained a copy of the judgment asked for, on his own behalf, this was really practising as a Mookhtar within the meaning of section 13. But even if that it can, by a very strict application of that section, that this was practising as a Mookhtar, no substantial offence had been committed. Under any circumstance, therefore, that nothing more than a nominal fine should be inflicted upon this expression of our opinion, the petitioner's Plea intimated to us that he does not wish to proceed further, we think that it is sufficient in this case if we reduce the fine to five rupees. We think it, however, right to caution the District Judge against accepting this judgment as a decision in favor of the legality of his proceedings. As already stated, we are well disposed to think that this violation was not liable to a fine.

PRINCE, J. PRINCE, J. :—

I agree in the order proposed. I would only draw attention to the alteration in the new Code of Civil Procedure giving the right of the parties to a suit to obtain copies. They no longer any privilege in this respect over strangers. Although

does not directly affect the present matter before us, because Baboo Peary Mohun Mookerjee was no party to the suit, still it has a certain bearing on this matter, and on the action of the District Judge in enforcing the provisions of section 13, Act XX of 1865. One who professes to apply on behalf of a party to a suit for a copy, obtains no advantage by doing so rather than by applying on his own behalf, and therefore would not be defrauding the public revenue in any way.

1878

In re

BAMA CHURN
GHOSHAL.

Judgment.

PRINSEP, J.

[CIVIL APPELLATE JURISDICTION.]

BHOY CHURN DEY PLAINTIFF;
AND
LUKHY MONEE BEWA DEFENDANT.

May 9.

Serment—Right of Way—Watercourse—Onus—Magistrate's order—Code of Criminal Procedure, section 532.

Where the right to have a way or watercourse over certain land is disputed by the owner thereof, and an order under section 532 of the Code of Criminal Procedure has been passed by the Magistrate in favour of the person claiming the right, the fact of such an order having been made will not be sufficient to relieve the latter from the onus of proving the claim, in a subsequent suit by the owner to establish his right to the exclusive use of the land.

Puchai Khan vs. Abed Sirdar, 21 W. R., 140, overruled.

SPECIAL APPEAL from a decree passed by the Additional Judge of the 24-Pergunnahs, reversing that of the Moonsiff of Bore. The judgment appealed from is as follows:—

In this case plaintiff sued for exclusive possession of land, and a declaration that the defendant had no right to use it as a water communication to neighbouring pond. Defendant claimed to have used the drain for upwards of twenty years, and added that she had been retained, in her position as user of it, by a direction of the Magistrate under section 532 of the new Criminal Procedure Code. The Moonsiff dismissed the suit. He put the onus of proof on the defendant, and considered that she had not set out a right by prescription. Now, section 532 of the present Code is similar to section 320 of the old Code, and it has been held by the High Court (W. R., 140) that, when an order has been passed under section 320, the effect of the order is to shift the burden of proof, and it is not sufficient if

1873
 ORDER
 CHIEF DEPT
 &
 LUTHER
 MOOREHEAD
 Judgment.

the person objecting to the easement proves that the land is his property. That decision is binding on this Court, and the result of it is that in the present case I must see if the plaintiff has shown that the land is his property and that the easement has not existed for twenty years. I regret to say that, in my opinion, the evidence is totally insufficient to sustain the latter conclusion, and that in the present state of the law the appeal must be allowed. He has produced two witnesses, and I do not consider the evidence sufficient to support the proposition mentioned above. I, therefore, find that plaintiff has not proved the easement to have originated within twenty years, and I decree the appeal with costs."

Plaintiff appealed specially to the High Court.

Baboo Hem Chander Banerjee, for the Appellant.

Baboo Umakali Mookerjee, for the Respondent.

The judgment of the High Court (1) is as follows :—

This is a suit to establish the plaintiff's exclusive right to certain land, free from any right in the defendant to use it as a passage for his surplus water. The Moonsiff found that the defendant had been unable to prove any prescriptive right to this passage of water, and he accordingly decreed the suit, setting aside the *ad-interim* order of the Criminal Court. On appeal, the District Judge, on the authority of the case reported in 21 W. R., 140, threw the *onus* on plaintiff to prove that the easement had not existed for twenty years; and, finding that plaintiff had failed to establish that, he set aside the order of the first Court and dismissed the suit. The District Judge was right in following the precedent quoted, but Mr. Justice AINSLIE, who delivered that judgment, has since re-considered the matter (in special appeal No. 1851 of 1877), and it is to be regretted that the more recent judgment, in which we entirely agree, has not been reported (2)

(1) MARENT and PRINSEP, J.J.

(2) The material portions of the judgment referred to, which was an appeal from the same Judge, are as follows :—"In this case the Magistrate made an order under section 532, Criminal Procedure Code, restraining the plaintiff from taking exclusive use of certain land, so as to close the road over it then found to be actually used and enjoyed by the defendant. If plaintiff brings this suit to have it declared that he has a right to close the road. The defendants set up a prescriptive right to the use of it."

To establish a right to the use or passage of water by prescription an uninterrupted user for twenty years is necessary; whereas, to give a Magistrate jurisdiction under section 532 of the Code of Criminal Procedure it is necessary only that such right has been exercised within three months from the date of the institution of the enquiry or in the season immediately preceding. The possession of an order by a Magistrate would not therefore, *prima facie*, establish a right to an easement. The suit must be remanded to the lower Appellate Court to find whether the Munsiff was correct in holding that the defendant had failed to prove the right that he claimed under the Magistrate's order. Under the circumstances, we give no costs of this appeal.

The Judge of the lower Appellate Court has found that the defendants have failed to carry back the evidence of user of the way in dispute to a time sufficiently remote to establish a prescriptive right, but, under the authority of a case decided by myself and reported in 21 W. R., 140, he considered himself bound to dismiss the suit, on the ground that the onus of proof is on the defendant to show that the Magistrate's order ought to be set aside. The correctness of that judgment has been questioned, and I am of opinion that it went too far, and that the rule was laid down too broadly. On further consideration, I am of opinion that the question, whether the order of the Magistrate, made under section 532 of the Criminal Procedure Code, ought to throw the burden of proof on the plaintiff in such a suit as the present, is really a question of preponderance of evidence to be determined by the Court which has to deal with the evidence in the suit. The admission of the Magistrate's order is evidence on one side; the Magistrate's order is evidence on the other, more or less cogent according to circumstances. Whether sufficiently cogent to shift the burden of proof, is, however, not a question of law but of fact. My learned brother, McDONELL, concurs in this view; and we, therefore, reverse the decision of the lower Appellate Court and restore the order of the First Court with costs.

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CHAND DIX
v.
LUCKY
MONSIEUR BIWA.
Judgment.

[CIVIL APPELLATE JURISDICTION.]

1878
May 16.

DONZELLI PLAINTIFF;

AND

TEKAN NODAF DEFENDANT.

Decision on Question of Title—Title—Suit for Rent—Act VIII (B.C.) of 1869, section 102—Special Appeal.

In a suit for rent, in which the sum claimed was less than Rs. 100, the defendant pleaded that the plaintiff had ceased to have any interest in the land, and the suit was dismissed. There was no finding as between the plaintiff and any other person claiming title to the land: *Held*, that a special appeal to the High Court was barred by section 102, Act VIII (B.C.) of 1869.

Kashoe Ram Dass vs. Maharanes Sham Mohinee, 23 W. R., 227; and *Shaikh Dilbar vs. Issur Okunder Roy*, 21 W. R., 36; cited and followed.

SPECIAL APPEAL from a decree passed by the Judge of Bhaugulpore, affirming that of the Moonsiff of Mudebpoorah, who dismissed the plaintiff's suit with costs. The judgment appealed from is as follows:—

The plaintiff sues certain tenants who deny his title as farmer of a certain share of the property. The Moonsiff has held that the plaintiff is not entitled to sue, and has dismissed the suit. The position of the plaintiff is a peculiar one, and requires to be explained. As regards the nine-anna share of the property, which plaintiff holds as farmer under Mr Palmer, there is no dispute; the history of the other seven annas appears to have been as follows: This seven annas was originally the property of one Gola Hossein, from whom, as also from his widow, Anisool Burka, plaintiff took a farm of it. The last lease expired in 1282. Meanwhile, during the pendency of this case, Anisool Burka, who, on her husband's death, had taken possession of the property on the strength of a deed of gift, executed in putnee in favour of one Kedar Nath Chuckerbutty. Plaintiff, about the time, appears to have discovered that Anisool was not the sole heir of Gola Hossein, but that a woman named Afeetoonissa and her children were also heirs, and, armed with a putnee from Afeetoonissa, the plaintiff sought to limit the rights of Anisool and her putneedar to a one-anna share of Gola Hossein's property. The case was tried as between plaintiff and Kedar

Nath, and though Afetoomiss was not made a party, yet it was declared that Mussumut Anisool was the sole heir of Golam Hossein, and that, as such, her putneedar was entitled to a four-annas share of Golam Hossein's estate. (See 20 W. R., 362.) In 1282, when plaintiff's lease lapsed, Kedar Nath Chuckerbutty took *khas* possession of his one-fourth share of the seven-annas share, equal to 1 anna 15 gundas share of the whole, and the plaintiff now claims the right to recover rent from 1282 of the remaining five-annas five-gundas share as being the party in possession. In some of these suits rent of 1284 only is claimed, but the real question to be decided is whether plaintiff has a right when her own lease has lapsed."

The learned Judge then went into the evidence and affirmed the Moonsiff's judgment on the ground that plaintiff showed no title to maintain the suit. Plaintiff then appealed specially to the High Court, where a preliminary objection was raised that a special appeal was barred by the provisions of section 102, Act VIII (B.C.) of 1869.

Paul, (Advocate-General,) for the Appellant. *Mr. C. Gregory*, *Baboo Rajendro Nath Boss* and *Baboo Omur Nath Boss*, with him.

Evans, for the Respondent. *Mr. M. L. Sandel*, with him.

The judgment of the Court (1) was delivered by

JACKSON, J. :—

JACKSON, J.

The question which arises in this case is whether the present appeal should be heard, the decision appealed from being one in which both the Courts below have concurrently found that the plaintiff had not the title which he assumed to have in suing the defendant for rent. There was no finding in either Court, as I understand, as between the plaintiff and any other person claiming that title; but in the judgment of both the Courts the plaintiff failed to satisfy them that he had the right on which his claim for rent rested, and the respondent contends that in this decision no question relating to a title to land or to some interest in land, as between parties having conflicting claims hereto, has been determined, and that, consequently, the amount sued for being less than Rs. 100, no appeal lies. The respon-

(1) JACKSON and TOTTENHAM, J.J.

1878
DOHERTY
v.
TREAN
NODAT.
Judgment.

1878
DONZELLI
v.
TEXAN
NODAF.
—
Judgment.
—
JACKSON, J.

dent relies upon a judgment of the late Chief Justice Sir RICHARD COUCH, in 28 W. R., 227—*Kashee Ram Dass vs. Mahorasse Sham Mohinee*, in which a previous judgment of Mr. Justice AINSLIE in 21 W. R., 36—*Shaikh Dilbar vs. Issur Chunder Ray*, is followed. It is within my recollection that this Bench has repeatedly held, that in similar cases no appeal would lie. It is contended by the learned Advocate-General for the appellant that a decision, such as we have before us now, must proceed upon the finding on the part of the Court below, that some person other than the plaintiff has the title which the plaintiff alleges to be in himself, and it is urged that much hardship might result if a decision of this kind, in which the plaintiff's title has been thrown out by the lower Appellate Court, should be allowed to remain final without being subjected to the scrutiny of the High Court in special appeal. Upon this argument I have only to observe that it seems to me that the terms of section 102 are quite explicit. The learned Advocate-General said that if we cut down the class of cases in which an appeal would lie in this way, the number of cases excepted will be extremely small.

But I observe that the excepted cases not only comprise those in which a title to land or interest in land has been determined but they comprise also suits in which the right to enhance or vary the rent of a ryot has been determined. There is thus a numerous class of cases to be excepted. I also pointed out during the argument that cases might be easily cited in which the question of interest in land, as between parties having conflicting claims thereto, might be determined, although there was no intervention. As to the question of hardship, that is not a matter which should influence us; and, on the other hand, I am inclined to think that probably the interests of justice will, on the whole, be better served if parties are compelled to resort to a proper suit in proper form and in the proper Court, in order to have those questions of right determined which are excluded from being brought in special appeal to this Court according to the provisions of this section. I, therefore, adhere to the opinion which I formerly expressed in these matters, and follow the judgment of Sir RICHARD COUCH. The appeal will be disallowed with costs.

[CIVIL APPELLATE JURISDICTION.]

NISTARINY DOSSEE DEFENDANT;
AND
ANUNDMOYE DOSSEE PLAINTIFF.

1878
 May 16.

Will—Suit to set aside a will—Limitation—Act IX of 1871, Schedule II, Clause 93.

Where no fraud is alleged, the three years' limitation in clause 93, of the 2nd Schedule to the Limitation Act of 1871, will run from any attempt to enforce the instrument, although that attempt might not have been known to the person who brings the suit to declare it a forgery.

Plaintiff and defendant are the widows of two joint uterine brothers. Defendant alleged that plaintiff's husband had left his share by will to the husband of defendant. Plaintiff, who alleged that the will was a forgery, brought a suit for a declaration of her right to her husband's share, after setting aside the will; *Held*, that the substance of the claim being for a declaration of right, and not to set aside the will, the suit was not governed by the three years' limitation provided by clause 93, Schedule II, Act IX of 1871.

APPEAL under section 15 of the Letters Patent from a decree passed by Mr. Justice PAINESE, affirming that of the Subordinate Judge of Jessore, which affirmed a decree of the Moonsiff of Jhenida.

The parties to this suit are the widows of two uterine brothers. The special appellant, Nistariny Dossee, brought a previous suit against one Juggut Ghose for arrears of rent. In that suit the special respondent Anundmoye Dossee intervened, questioning the right of Nistariny to recover whole rents from Juggut Ghose, and claiming to be entitled to a moiety thereof. Nistariny produced a will which she alleged was the will of Anundmoye's husband, the brother of Nistariny's husband, by which the former devised to the latter his share in the property. The Court of First Instance found that Anundmoye and Nistariny were co-sharers, and that the will was a forgery. This judgment was set aside on appeal, and Nistariny's claim to receive whole rents

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 NISTARINY
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 v.
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 DOSSEE.
 —
 Statement.
 —

was decreed, the validity or otherwise of the will not having been gone into, on the ground that it was wholly irrelevant to the subject-matter of that suit.

Anundmoye then brought the present suit to establish her right to the half share of the rents and to set aside the will. The defendant pleaded adverse possession for twelve years, and set up the will. The Court of First Instance gave plaintiff a decree, but on appeal the cause was remanded for the purpose of finding whether the plaintiff was not barred under clause 93 of the 2nd Schedule to the Limitation Act of 1871, as it appeared that the will had been set up in a previous rent suit brought by Nistariny Dossee in 1871, but in which Anundmoye had not intervened. This issue was found in Anundmoye's favour, and the Moonsiff's decree was upheld on appeal. The defendant appealed specially to the High Court, but the appeal was dismissed with costs. The material portion of the judgment is as follows :

"The first ground taken in special appeal is, that the Subordinate Judge is wrong in his finding on the point of limitation, as in a former suit in 1871 the will was produced and defendant obtained a decree for rent on it. But the present plaintiff was not party to that suit, and as the Subordinate Judge has, in the present suit, distinctly found that the plaintiff was not cognizant of that suit, and was not aware of the existence of this will until the recent rent suit (against Juggut Ghose), that finding cannot be questioned in special appeal. I would also here observe that probate of this will has never yet been asked for or obtained."

The defendant appealed under section 15 of the Letters Patent.

Baboo Shoshi Bhusun Dutt, for Appellant.

Baboo Protap Chunder Mozoomdar, for Respondent.

The judgment of the Court (1) was delivered by

GARTH, C.J. GARTH, C.J. (McDONELL, J., concurring) :—

We think that this appeal should be dismissed. If this case depended upon the three years' limitation provided by article 93

(1) GARTH, C.J., and McDONELL, J.

of the 2nd Schedule of Act IX of 1871, we should feel some difficulty in confirming the learned Judge's decision, because we cannot help thinking that, as no fraud was alleged in this case, the three years' limitation mentioned in that article would run from any attempt to enforce the instrument, although that attempt might not have been known to the person who brings the suit to establish the forgery. If that were not so, it might happen that attempts might have been made over and over again in the most public way to enforce a will, and yet, because those attempts were not known to one particular person, that person might, after the lapse of fifty years, be entitled to bring a suit to declare the will to be forged. That could hardly be the intention of article 93 of the Limitation Act. But when we come to look at the real substance of this suit we find that it was really brought to obtain a declaration of the plaintiff's title to one-half of the rent which is claimed, and, moreover, it was so treated by the parties in the Court of First Instance; because, originally, the only issues which were framed were, first, as to the genuineness of the will; and, secondly, as to the twelve years' limitation. The issue as to limitation was, "whether the plaintiff was in possession of the lands within twelve years previous to the suit; not, whether her claim is barred by limitation." And it was only after the remand by the lower Appellate Court that an issue was raised as to the three years' limitation. That issue was, whether the plaintiff's claim has been barred by limitation under article 93 of the 2nd Schedule of the Limitation Act."

Now, taking the claim of the plaintiff to be, as it substantially is, for obtaining a declaration of her title to the 8-annas share of the rent, the only course which the defendant could have taken in answer to the claim was to set up the will; and we find that in fact the defendant did set up the will, and also the twelve years' limitation, so that the substance of this suit is not to declare the forgery of the will. The substantial part of it is, to have the plaintiff's title declared to an 8-annas share of the rent; and it was not in fact necessary for the plaintiffs to have said anything about the will in the prayer of the plaint.

We think, therefore, that the three years' limitation provided in article 93 of the Limitation Act does not apply, but that the

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DOSSER
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DOSSER.

Judgment.

GARTH, C.J.

1878

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DOSSEH.

Judgment.

GARTH, C.J.

period of limitation applicable to the claim is twelve years. That being so, it is clear from the judgment of both Courts, that the defendant never made any substantial resistance to the plaintiff's *prima facie* case. It was amply proved that the plaintiff's husband and the defendant's husband were brothers; that, during their lives, they lived together in joint mess, and enjoyed the property jointly; and that, after their death, the plaintiff and the defendant in like manner continued, until the year 1278 (= 1869), to live together, and to enjoy the family property jointly. This has been found by both the lower Courts, and the fact of the plaintiff being in possession of the half share which she claims up to the year 1869 completely disposes of the question of the twelve years' limitation. This appeal must, therefore, be dismissed; but not upon the ground upon which it was dismissed by the learned Judge of this Court. The respondent will have her costs in this Court.

I should add that it would have been a great denial of justice if we had been compelled to hold otherwise; because the question of the genuineness of the will appears to have been thoroughly tried by both the lower Courts, and the will has been found by both to be a forgery.

[CIVIL APPELLATE JURISDICTION.]

DHA GOBIND SHAHA. DEFENDANT;

AND

E BANK OF BENGAL PLAINTIFF.

1878
May 21.*'s of Exchange—Mortgage bond—Novation—Collateral Security—Presumption.*

Where a person, who is indebted on certain bills of exchange accepted by him, gives a bond for securing payment of the whole amount with interest, by instalments, the fact that the bills were not to be given back until all the instalments should be paid, raises a presumption that the bond was only intended to be a collateral security, and not a substitution, for the obligation arising from the bills of exchange. Such a presumption may be impliedly rebutted by other circumstances.

Weston vs. Foster, 2 Bingh. N. C., 693, cited.

HIS was a suit to recover the sum of Rs. 97,500, and interest, amount of twenty-three bills of exchange, accepted, or endorsed by the defendant. The bills, which were all drawn at short date, fell due on different days between the 4th of July and the 4th of September 1876. Some time in July 1876, the defendant, being unable to meet the bills as they became due, executed a bond for Rs. 97,500, the amount of the bills, pledging several properties to secure the payment of that sum. The bond recited the accepting and endorsing of the bills, and the defendant's inability to meet them as they became due, and declared that the above sum should be paid in monthly instalments of Rs. 5,000 each, commencing in September 1876. It was declared that in default of payment of any instalment the Bank might sue for and realize the whole of all the instalments then remaining unpaid; that interest at the rate of 8 annas per cent. per mensem should be paid on the unpaid instalments; and that, whenever a sum should be paid, the amount was to be noted on the back of the bond, and bills to that amount returned to, and mortgaged property to half that amount released to, the defendant. No part of the interest or principal was paid, and the plaintiff now sued on the bills, claiming, besides, on the mortgaged properties. The plaintiffs prayed "for a decree for Rs. 97,500, with interest thereon at the rate of 12 per cent. per annum from the due date of the said bills respectively,

1878
BISHA
GOSWAMI
SARMA
v.
THE BANK
OF ENGLAND
Judgment.

and they also pray that they may be declared to have a lien for the said amount on the said houses, lands, property and bills contained in the said deed of mortgage, and that the same may be sold and applied in satisfaction of the amount of the said decree."

The defendants pleaded, *inter alia*, that the taking of the bond amounted to a novation of the obligation in respect of the bills of exchange; that the plaintiff should have sued on that bond alone; and that, even if the plaintiff were held entitled to recover, he should be bound to pay the excess stamp duty caused by the plaint being wrongly framed. The lower Court gave plaintiff a decree, and defendant appealed.

J. D. Bell, for Appellant. *Baboo Lall Mohun Das*, with him, *Paul*, (Advocate-General,) and *Stokoe*, for Respondent.

The judgment of the Court (1) was delivered by

GARTH, C.J. GARTH, C.J. (McDONKELL, J., concurring):—

Since the Court rose last night, I have had an opportunity of looking into the authorities upon the point that was being pressed upon us by the learned Advocate-General, namely, that the mortgage bond in this case was a collateral security for the bills, and not a contract in substitution for them; and I am bound to say, in justice to the Advocate-General as well as to his clients, that there seems to be much more reason than I at first supposed for considering the mortgage bond as a collateral security. The circumstance which the Advocate-General relied upon, namely, that the bills were not to be given back until the instalments were paid under the bond, was at least sufficient reason for raising a question upon that point.

There is a case of *Weston vs. Foster*, 2 Bingh., New Cases, 693, in which that test was applied; and, guided in some degree by that test, the instrument in question was found by the Jury to be a collateral security, and not a substituted contract. In that case the master of a ship had been obliged to borrow money from the plaintiff for repairs. He gave the plaintiff bills drawn by himself upon the defendant, who was the owner of the ship, for the amount borrowed. The plaintiff, not being

(1) GARTH, C.J., and McDONKELL, J.

satisfied with the bills, obtained afterwards from the defendant a bottomry bond to secure the same amount; and, when the plaintiff afterwards sued the defendant for the money advanced, this bond was set up as a substituted contract. But the Jury found that the bond was intended as a collateral security; and one of the grounds upon which that finding was based, was, that the bills were not given back to the master at the time when the bottomry bond was executed.

But, on considering the terms of the bond in this case with reference to the fact of the retention of the bills, I think that the explanation is tolerably clear. As between the plaintiffs and the defendant, I entertain no doubt whatever that the Judge in the Court below was right in holding that this bond was given, and intended to be, in substitution of the defendant's liability upon the bills. The claim against the defendant upon the bills would have been for a different amount, and payable at different times, from the claim upon the bond; and the plaintiff's right to sue upon the bills was inconsistent, and could not, in my opinion, co-exist, with his liability upon the bond.

The only consideration for the mortgage, as it seems to me, was this very substitution of the liability upon the bond for the liability upon the bills. It was a substitution favourable to the defendant in two very material respects. First, it gave him a much longer time to pay the money; and, secondly, it relieved him from more than half the interest which he would have had to pay upon the bills, besides notarial charges, &c. The language of the bond, too, is very clear.

It virtually provides that, until failure to pay the first instalment under it, the defendant was not liable to be sued at all; and if he failed to pay that instalment, then the plaintiff was to be at liberty to sue him, not upon the bills, but for the remaining instalments and interest at six per cent.

The true meaning of the stipulation with regard to the retention of the bills appears to be this: There were other parties to the bills besides the defendant. Some of them were accepted by Laletta & Co., and all were drawn by Mr. Pogose, or some persons other than the Bank; and although, as between the plaintiffs and the defendant, the bond was in substitution for the claim upon

1878
 RADHA
 GOBIND
 SHARMA
 v.
 THE BANK
 OF BENGAL.
 Judgment.
 GARTH, C.J.

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SEAH.THE BANK
OF BENGAL.*Judgment.*

GARTH, C.J.

the bills, the plaintiffs retained their claims as regards the other parties to the bills until the whole of the instalments had been paid.

I have no doubt that this is the true explanation of the retention of the bills; but, at the same time, I quite admit that the plaintiffs had some reason for framing their plaint as they did, and I am very glad to be able to acquit them of what I, at one time yesterday, could not help thinking they had attempted to do, viz., to charge the defendant unfairly with a large sum of money, by way of interest, for which they knew he was not justly liable.

The only question now is, whether, having regard to the pleadings and the issue framed by the Judge, we can say that the Judge was wrong in the course which he took. If the defendant had simply rested his defence upon the fact of the substitution of the bond for the claim upon the bills, and an issue had been framed raising that defence only, I should still have been inclined to say that the plaintiff's claim ought to have been dismissed. But the defendant, in his written statement, has not only set up the bond, but also all the defences which he could have raised to a claim upon it. An issue has been fixed by the Judge, which we cannot help seeing raises the whole question of the defendant's liability; and evidence has been gone into on both sides upon that issue, namely, whether the defendant is liable either upon the bills or the bond. That being so, it is impossible for us to say that the defendant has been placed under any disadvantage; and as the whole question of his liability has been fairly tried, we must confirm in substance the judgment of the lower Court.

We think, however, that the Judge was wrong in making the defendant pay the additional stamp fee which the frame of the plaint rendered necessary. If the plaintiffs chose to sue upon the bills, the defendant's vakeel was quite right to insist upon their paying the proper stamp fee; and the Judge had no right to visit the consequences of the plaintiff's mistake on the defendant. The defendant, therefore, is not liable to pay the difference between the stamp fee on the bond and that upon the bills. The plaintiffs must pay this, and the accounts must be adjusted upon that footing. Each party, under the circumstances, will pay his own costs in this Court.

[CIVIL APPELLATE JURISDICTION.]

PROTAP CHUNDER CHOWDHRY

AND OTHERS

} DEFENDANTS;

1878
May 25.

AND

SHUKHEE SOONDUREE DASSEE . . .

PLAINTIFF.

*Resumption—Assessment—Lakhiraj Lands—Decree in Resumption Suit—
Limitation—Act IX of 1871, Sch. II, Art. 130.*

A got a decree against B which declared that certain lands in B's possession, alleged to have been *lakhiraj* lands from before 1790, were A's *mal* lands and liable to assessment. More than twelve years after the date of this decree, A sued to assess the lands: *Held*, (affirming the decision of AINSLIE, J.) that the suit was not barred by the provisions of Act IX of 1871, Sch. II, Art. 130.

APPEAL under section 15 of the Letters Patent from a decree passed by Mr. Justice AINSLIE. The suit, which was instituted on the 12th of June 1875 for assessment of rent, was decreed in both the lower Courts, and the defendants appealed specially to the High Court. The judgment of the learned Judge is as follows:

"Plaintiff having obtained a decree under section 30, Regulation II of 1819, on the 11th of March 1863, subsequently sued for *kabulyat*, but lost her case, as there was a variance between the rates proved to be fair and equitable, and the rates at which, according to her allegations, the pottah was tendered. She now sues for assessment of rent. The Moonsiff held that she was entitled to a rent of Rs. 15-3-8 from the year 1283 B.S. On appeal, the District Judge reduced the rent, and added a somewhat indefinite declaration of the rights of the plaintiff in the event of the defendant refusing to hold on the terms fixed by the Court.

"The defendant has appealed specially, urging, first, that the suit is entirely barred by the Statute of Limitations; and, secondly, that the Civil Court had no jurisdiction in the suit.

"The effect of the decree in the resumption suit was to declare that the land in the possession of the defendant had been part

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 PROTAP  
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Statement.

of the permanently-settled estate, and had been separated from it by an invalid grant, and thereon to resume the same and re-annex the land to the zemindar's estate. It did not, however, interfere with the grantee's right to continue in possession, if he should be so minded; but it necessarily forced him, if he continued in possession, to hold as tenant of the zemindar. The words of section 10, Regulation XIX of 1793, and of section 20, Act X of 1859, show clearly that it was only in respect of the alleged proprietary right under a grant that there was to be dispossession, and it seems to me that there is nothing in the law which indicates that there was to be an absolute ouster from the land. The position of the grantee after decree is not therefore that of a person holding adversely to the zemindar, but just the reverse; he was holding adversely before the decree, as he was holding on an allegation of title in himself, but after decree, if he did not vacate the land, he must be taken to hold it, as when it has been declared to be, part of the zemindar's estate, subject to the liability in respect of rent which attaches to all persons holding by license of the zemindar. The decree in the resumption case having left the defendant in the position of a tenant he cannot, without an intermediate surrender of the land to the landlord, change his position and assert that he holds as squatter or trespasser. The fact that no rent was settled or paid does not alter the character of the holding subsequent to decree in the resumption suit. Where defendant elected to hold on, notwithstanding the declaration that he could only do so as tenant of the plaintiff, he elected to hold as such tenant on whatever might be found to be fair and equitable terms. He has had the advantage of plaintiff's remissness, in escaping payment of rent for a number of years, but this cannot be extended into giving him a future right to hold rent-free.

"The case of *Srimati Saudamini Debi vs. Sarup Chandra* 8 B. L. R., 82, appendix; 17 W. R., 363, which was cited by the Moonsiff, gives a considerable body of authority in support of the view therein adopted. A recent case, (1) supposed to

(1) Special appeal No. 2858 of 1876, before KEMP and MORRIS, J.J. In this case it appeared that plaintiff had brought a previous suit against the defendant for the resumption of certain lands, (which the latter case

inconsistent with this view, has been cited by the appellant, it seems to me that there was a peculiarity about that case that the plaintiff was seeking to eject the defendant as a passer, and falsely alleged the existence of a *lakhiraj* title. It may very well be that, if the occupation of the defendant was adverse *ab initio*, limitation was not to be avoided by the decree of an intermediate suit to cancel as invalid a rent-grant, the existence of which was in fact denied from first. A suit under section 28, Act X of 1859, presupposes existence of a grant the efficacy of which is disputed. I see no reason to suppose that the mere existence of a so-called resumption decree necessarily protects a zemindar

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Statement.

have been his rent-free lands from before the time of the permanent settlement) and had obtained a decree on the 4th April 1862. Nothing further happened until the 16th of February 1874, on which date the plaintiff served the defendant with a notice to quit, in pursuance of which he brought the present suit for *khas* possession on the 5th of March 1874. The case set up was, that the land was rent-free from before the time of the permanent settlement; that the defendant and his predecessors had held the land adversely to the plaintiff for more than sixty years; and that, therefore, the suit was barred by limitation. The lower Court held that the decree for resumption of the 4th of April 1862 had changed the character of the defendant's possession, and had made him a trespasser; and the present suit, being brought within twelve years from the date of the decree, was not barred by limitation. In special appeal the High Court delivered the following judgment:—

It is clear that the present suit is brought eleven years and nearly six months after the plaintiffs obtained the decree declaring these lands to be *mal* lands, on the 4th of April 1862. The lower Courts have not considered the issue of limitation in a proper manner; they seem to have confined themselves to the point whether the suit was brought within twelve years of the decree declaring these lands to be *mal* lands. The defendant claims that these lands have been in the possession of himself and his predecessors adversely to the plaintiffs for a very long period of more than sixty years. The Courts below, therefore, ought to have enquired into the nature of the possession of the defendants for the period prior to the decree passed on the 11th of April 1862; for if the defendant was in possession before the date of that decree on an adverse title, the suit of the plaintiff is barred. The case is, therefore, remanded for a trial on the issue of limitation. The parties are permitted to adduce additional evidence. Costs to follow the result."



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 —  
 Judgment.

from the effect of his own statements in a suit, when such statements, by denying the existence at any time of a grant, go to show that his resumption decree was wrongly obtained. On the question of jurisdiction, I am of opinion that the decree does not show that the property was to be resumed as a dependent talook under the provisions of section 9, Regulation XIX of 1793, and therefore there is nothing to interfere with the jurisdiction of the Civil Court. The special appeal is dismissed with costs."

The defendant appealed under section 15 of the Letters Patent on the grounds that (1) the suit for assessment was barred under Act IX of 1871, schedule II, article 130; and that the Civil Court had no jurisdiction to assess the rent of a tenure alleged to have existed from before 1790.

*Baboo Huree Mohun Chuckerbutty*, for Appellant.  
*Baboo Gooroo Dass Bannerjee*, for Respondent.

The judgment of the Court (1) was delivered by

GARTH, C.J. GARTH, C.J. (McDONELL, J., concurring):—

We think Mr. Justice AINSLIE has taken a correct view of the law. There is a strong current of authority in support of that view, and we see no reason to differ from his judgment. The appeal is dismissed with costs.

(1) GARTH, C.J. and McDONELL, J.

## [CIVIL APPELLATE JURISDICTION.]

AKHARUDDIN MAHOMED AHSAN . . PLAINTIFF;

AND

L. P. POGOSE . . . . . DEFENDANT.

1878  
May 27.*imitation—Hibbanamah—Regular suit—Res Judicata—Act IX of 1871,  
schedule II, cl. 93.*

A suit instituted by a Mahomedan wife against her husband, for dower, was appealed to the High Court and thence to the Privy Council. Pending the appeal to the High Court the wife agreed that she would give to A a 4-anna share of whatever she should recover in the suit, on condition that A should advance money for her maintenance and for the purpose of carrying on the appeal, and a *hibbanamah* was executed to that effect. Pending the appeal to the Privy Council the wife died; A applied to be put upon the record of the suit in her place, and the application was granted in January 1867. The suit was ultimately decided against the husband, but he objected to execution of the Privy Council decree being allowed to issue against him at A's instance, on the ground that the *hibbanamah* had been obtained by fraud and forgery. The objection was overruled and execution was allowed.

*Held*, that a subsequent suit to set aside the *hibbanamah* was unaffected by the order made in the execution proceedings; but that such suit was barred by limitation, under Art. 93, Sch. II., of the Limitation Act of 1871, it not having been instituted within three years of the time when A applied to have his name substituted on the record instead of that of the wife.

*Abadoonissa vs Ameroonissa*, 20 W. R., 305; L. R., 4 I. A., 66; I. L. R., 2 Cal., 327, cited and followed.

**REGULAR APPEAL** from a decree passed by the Judge of Meerpore, dismissing the plaintiff's suit with costs.

On the 30th of December 1861, one Nujumunissa Khatoon filed a plaint against her husband Fakharuddin Mahomed Ahsan Chowdhry, for possession of certain lands, ornaments and jewelry, which she claimed by virtue of a *kabinnama* or deed of dower executed in March 1834. The suit, which was laid at Rs. 4,70,000, was dismissed with costs by the Principal Sudder Ameen of Meerpore, on the 3rd of September 1863, and Nujumunissa appealed to the High Court.

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Uddin  
Mahomed  
Ansari  
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N. P. Pogose.

Statement.

At this time, Nujumunissa agreed to give a 4-anna share of all the property she might recover in the suit to N. P. Pogose, on consideration that he should provide funds for carrying on the suit and for the maintenance of herself and her son. This agreement was executed on the 18th of July 1864.

On the 27th of July 1864, the High Court of Calcutta reversed the judgment of the lower Court, and decreed that the plaintiff should have possession of the lands claimed and wasilat, with interest and costs.

Fakharuddin applied for leave to appeal to the Privy Council, on the 23rd of December 1864. Before the admission of the appeal, Nujumunissa died, leaving Fakharuddin and several children surviving.

On the 17th day of January 1865, N. P. Pogose applied for and obtained an order of Court directing that his name should be recorded as one of the respondents to the appeal in respect of his 4-anna share. By a subsequent order of the 28th of February 1866, it was declared that the admission of Pogose should be without prejudice to the right of Fakharuddin as one of the heirs of his wife, the plaintiff, to contest the title under which Pogose claimed. On the 26th of January 1874, the Privy Council affirmed the decree of the High Court with costs.

Pogose proceeded to take out execution of this decree, which was opposed by the judgment-debtor on the ground that the *hibbanamah* was fraudulent. The objection was overruled, and execution allowed to issue on the 25th of September 1875. Plaintiff then instituted the present suit, for the purpose of having the *hibbanamah* set aside, on the 19th of December 1875.

The lower Court dismissed the suit on the ground that the claim had been previously heard and determined in the execution proceedings, and also on the ground that the plaintiff should have come in within three years of the order admitting N. P. Pogose respondent on the record of the Privy Council Appeal, under the provisions of Article 93 (or 95) of the Limitation Act of 1871. The plaintiff appealed to the High Court.

Branson for the Appellant. Baboo Grija Sunker Mosoomdar, Baboo Mohini Mohun Roy, and Baboo Tarinee Kant Bhattacharjee for Appellant.

*Paul*, (Advocate-General,) and *Evans*, for Respondent.  
*Mr. Morgan*, with them.

The judgment of the Court (1) was delivered by

JACKSON, J. :—

As we have no doubt whatever as to what ought to be the result of this appeal, and as there are other cases depending upon it, we may as well announce what our decision is. We may, if necessary, hereafter state at greater length the reasons which have led to that decision. This suit was dismissed in the Court below upon two preliminary grounds: the first being that the question was in reality *res judicata*; and the second being the ground of limitation.

As to the first point, Mr. Branson has satisfied us that the decision of the Court below was wrong. It is not necessary at present that we should do more than cite the case reported in 10 W. R., p. 305—*Ameeroonissa Khatoon vs. Abedoonissa Khatoon*, a decision of the late Chief Justice of this Court, in which we entirely concur, and which decision has since been affirmed by the Judicial Committee of the Privy Council (L. R., 4 I. A., 66). It is clear to us that the actual adjudication of this matter would have to be made in a regular suit brought for that purpose, and not by any order made in execution of decrees. In fact this matter was so clear that Mr. Evans has not thought necessary to argue the question.

The other ground on which the judgment of the Court below proceeded is that of limitation. Mr. Branson's argument proceeded entirely upon what he maintains to be the proper construction of Article 93 of the second schedule of Act IX of 1871. This, to take the view most favourable to the plaintiff, is a suit "to declare the forgery of an instrument issued or registered or attempted to be enforced." Certainly no other article of the schedule can be found which would be more favourable for the purposes of the suit. The time when the period begins to run in such suits is "the date of the issue, registration or attempt." I should be disposed to hold that these dates were applicable respectively to the circumstances under which the

(1) JACKSON and TOTTENHAM, J.J.

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 UDDIN  
 MAHOMED  
 AHMED

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Judgment.

JACKSON, J.

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 FAKHAN-  
 EDDIN  
 MARSHED  
 ANSAR  
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 N. P. POGOSE.

*Judgment.*  
 JACKSON, J.

instrument has been published, that is to say, where it has been issued, the time begins to run from the date of the issue; where it has been registered, the time runs from the date of registration, and so on. But it is clear that the suit at any rate would be barred at the expiration of three years from some one or other of the acts described in the third column, that is to say, the issue, registration or attempt. The acts or matters specified in the third column of that schedule are acts which, according to the intention of the Legislature, put the plaintiff upon the assertion of his rights, and in the case of an instrument which is said to be forged, and which prejudices the plaintiff, the Legislature apparently thought that he ought to commence the suit, as he has notice of the instrument by the issue, registration or attempt to enforce it. If we say that the plaintiff is entitled to have his time run from the latest of those three acts, then it is contended that in the present suit he is in time. Mr. Pogose, on obtaining from Nujumunissa a *kibbanama* which the plaintiff seeks to have set aside, applied, during the pendency of Azim Chowdhry's appeal, to be put on the record as a respondent. That application was made some time in 1865, and the order upon that is dated January 1867. Now Mr. Branson contends that that was not an enforcement of or an attempt to enforce that instrument. It seems to me it clearly was such an attempt to enforce the instrument as, under Article 93, obliged plaintiff to bring his suit within three years of such attempt. It is not necessary for the purposes of that article that the person who is to profit by the instrument should seek to obtain the entire fruits of it. It is quite enough, in my opinion, if, having obtained the instrument he seeks to place himself in an advantageous position which he could not occupy for the instrument he could not occupy. It clearly was the first advantage that Mr. Pogose could take by the enforcement of the instrument to have himself placed on the record of the appeal in order to be benefited by the final decision if the appeal was dismissed. I think, therefore, that by this application, he attempted to enforce that instrument, and that the suit ought to have been brought within three years from the date of such attempt. On this ground I think that this appeal ought to be dismissed with costs.

## [CIVIL APPELLATE JURISDICTION.]

JOGESH CHUNDER CHAKRAVARTI. . . PETITIONER ;

AND

UMATARA DEBYA. . . . . OPPOSITE PARTY.

*Guardian—Minor—Testamentary Guardian—Majority—Act IX of 1875,  
sec. 3, cl. 1.*

1878  
May 28.

Where a person, who by his father's will is made guardian of his minor brother, applies for and obtains probate of the will, the grant of probate only establishes the authority of his appointment. Such a guardian is not one "appointed by a Court of Justice" within the meaning of cl. 1, sec. 3, Act IX of 1875, and the minor attains majority on his completing the age of eighteen years.

**R**EGULAR APPEAL from an order passed by the Officiating Judge of Backergunge.

The material facts of the case are as follows : Mohan Chandra Chakravarti died on the 11th of Magh 1281 (23rd of January 1875), leaving a will, of which he appointed his second son executor. The executor was also (it may be taken) appointed, by the will, guardian of his minor brothers Womesh and Jogesh. The executor died before the estate was fully administered, and Jogesh now applies for letters of administration to the estate and effects of his father remaining unadministered. The application was opposed on the ground, *inter alia*, that the petitioner was a minor, and therefore incompetent to receive a grant of letters of administration under section 189 of Act X of 1865. The learned Judge held that the order of probate granted to the petitioner's brother was an order of a Court of Justice under which Bilash acted as a guardian over his minor brothers ; that, therefore, the petitioner would not, under cl. 1, sec. 3, of Act IX of 1875, attain majority until he should have attained twenty-one years of age ; and, as the petitioner's age was found to be only seventeen years, the application was dismissed with costs. The petitioner appealed to the High Court.

1878 Baboo Doorga Mohun Dass, Baboo Bhoobun Moohun Dass, and  
 JOGENDR CHAKRAVARTI Baboo Trylokkhynath Mitter, for the Appellant.  
 CHAKRAVARTI Baboo Bhowany Churn Dutt, and Baboo Juggut Chander  
 v. Banerjee, for Respondent.

UMATARA  
 DEBYA.

Judgment.

MARKBY, J.

The judgment of the Court (1) was delivered by

MARKBY, J. :—

We think that, whatever may have been the case when the District Judge delivered his judgment in this case, the applicant for letters of administration is of sufficient age now to entitle him to receive letters of administration under section 229 of Act X of 1865. By the law, no doubt, letters of administration under that section could not be granted to a minor, but in our opinion the petitioner is not now a minor. Even, taking the facts as found by the Court below, he is now above the age of eighteen years. The District Judge found, more than a year ago, that he was then about the age of seventeen years, but the District Judge thought that he would not attain the age of majority until he had completed twenty-one years; because he thought that the petitioner in this case was a person to whom the first part of section 3 of Act IX of 1875 was applicable. It would only be applicable to the petitioner if a guardian of his person or property has been appointed by a Court of Justice. He does not fall within the other part of the clause, namely a person under the jurisdiction of the Court of Wards. Now, what the District Judge takes to have been the appointment of a guardian by Court of Justice, was the grant of probate to the petitioner's brother of the father's will. The Judge says that, by the terms of the will, Bilash was to act for the petitioner and his brothers and sisters, as guardian, and he considers that the grant of probate to Bilash was in fact the appointment of Bilash as guardian of his minor brothers and sisters under the will. I have very considerable doubt whether Bilash was made a guardian of his minor brothers and sisters under the will. No doubt it was his duty under the will to manage the property on their behalf, but I am very much disposed to think that he was not so much a guardian of his minor brothers and sisters as a trustee of their property.

(1) MARKBY and PRINSEP, J.J.

We have not the whole will before us, and therefore it is better not to express any final opinion upon that matter. But, even supposing that Bilash was the guardian of the petitioner, he was so, in my opinion, not by the appointment of a Court, but by the appointment of the father. It is evident that that section intended to draw a distinction between guardians appointed by Courts of Justice and other guardians, and in my opinion Bilash was appointed by his father, and not by a Court of Justice within the meaning of this Act. I consider that the grant of probate to Bilash did not in any way appoint Bilash to be a guardian of his minor brothers and sisters; but, assuming him to be testamentary guardian, that would only establish the authority of his appointment. Therefore the petitioner, not falling within the conditions of the first clause of section 3, attained the majority under the second clause on his completing the age of eighteen years. In that view of the matter whatever may have been the state of things in the Court below, the petitioner is now entitled to letters of administration under section 229 of Act X of 1865, and he will get them on his furnishing the necessary security. We make no order as to the costs of this appeal. The order of the lower Court as to the costs will stand unreversed.

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JOGESH  
CHUNDER  
CHAKRAVARTIv.  
UMATARA  
DERYA.

Judgment.

MARKBY, J.



## [CIVIL APPELLATE JURISDICTION.]

1875  
May 21.

**HIRDEY NARAIN AND OTHERS . . . . . DEFENDANTS**  
**AND**  
**SYED ATTAULLA AND OTHERS . . . . . PLAINTIFFS.**

*Mortgage of several properties—Purchaser—Liability of subsequent purchaser—Apportionment of mortgage-debt.*

Where a mortgage-decree has been obtained on a bond under which several distinct properties were pledged to secure the repayment of a sum of money, and a portion of the demand has been satisfied in execution of the decree, and the decree-holder brings a suit to enforce his claim against a *bona fide* purchaser for value in possession of one of the mortgaged properties, the defendant will not be held liable for a greater proportion of the mortgage-debt than the value of his purchase bears to that of the whole property mortgaged.

*Seemle*, that, in such a suit, the *onus* is on the defendant to show that the amount claimed is more than he is properly called upon to pay.

*Hoolas Koorsee vs. Bibi Safoekun*, 8 W. R., 379, explained; *Narain Singh vs. Azimut Ali Khan*, 13 Moore's Ind. Ap., 404, followed.

**SPECIAL APPEAL** from a decree passed by the Subordinate Judge of Bhaugulpore, affirming that of the Moonsiff, Monghyr.

On the 11th of May 1874, a mortgage-decree was obtained by one Mugni Ram against Mahomed Wahidel Huq. The mortgage included several distinct properties, some of which were sold in execution of the decree, and in this way the whole claim was satisfied with the exception of Rs. 970-8-0. Afterwards, the property in dispute in the present suit was attached but was released from attachment on the intervention of Hirdey Narain Singh, who, subsequently to the mortgage, had purchased the property at an auction-sale for arrears of Government tax held under section 54 of Act XI of 1859. Syed Attaulla, assignee of the original decree-holder, then brought the present suit to have his lien declared, and to recover the Rs. 970-8-0 with interest.

The defendant charged that, a portion of the mortgaged property being still in the hands of the debtor, the decree-holder should have proceeded against that in the first place; and that, as the decree-holder had, in execution of his own decree, purchased a portion of the mortgaged property, he was bound to credit himself with a sum sufficient to cover the proportion of the mortgage-debt attributable to that portion. Both the lower Courts gave plaintiff a decree. The defendant then brought this special appeal.

1878  
HINDEY  
NARAIN  
v.  
SYUD  
ATTAULLA.  
Judgment.

Mr. R. E. Twidale, for Appellant.

Mr. Sandel, for Respondent.

The judgment of the Court (1) was delivered by

JACKSON, J. :—

JACKSON, J.

What the plaintiffs sought in this suit was an order that a certain mehal or a share in a mehal, in the possession of the defendants, might be brought to sale in satisfaction of the balance due on a mortgage-debt secured originally upon some seventeen estates, of which the property now in question is one. It was stated in the plaint that all those properties, that is, all the others over which the mortgage extended, being sold, the plaintiffs obtained Rs. 5,882 out of the said decretal amount, but that, Rs. 759 still remaining unpaid, an application was made for the share in suit being sold in execution; but, upon the petition of objection on behalf of the defendants, the property was released from sale.

The principal objection made by the defendants was that the suit of the plaintiffs could not proceed unless an account were taken of the whole mortgage property as it stood in the hands of different purchasers, and which property had been separately assessed in respect of its liability to satisfy the whole mortgage, and the objection is made particularly in respect of the properties which one Hur Prosad Chowdhry, and others, purchased, in satisfaction of the security, from the plaintiffs themselves.

The Moonsiff overruled the plea of the defendants, and gave judgment for the plaintiffs. On appeal, the Subordinate Judge,

(1) JACKSON and TOTTENHAM, J.J.

1863  
 HIRSHY  
 V.  
 SHY  
 APPELLA  
 Judgment  
 JACKSON, J.

after setting out the several pleas taken by the defendants, noticed the fourth, which is to this effect: "The property mortgaged as entered in the decree by the plaintiff, is 18 kullums, and of these some are in the possession of the judgment-debtor and some in that of other purchasers. The plaintiff has no right of putting to sale the share in dispute only, leaving out all these properties." His finding upon that is to the following effect: "It is an admitted fact that the whole property mortgaged in the decree alleged by the plaintiff is mortgaged collectively. In case of its being joint, the plaintiff is at liberty to realize the amount of his decree from whatever property he likes out of the property mortgaged. This right of the plaintiff cannot be rendered null and void, for the reason that the defendants, first party, have become purchasers of one property out of the property mortgaged;" and then he takes up the fifth plea, viz., "that the plaintiff should apportion the whole of his mortgage-debt upon the whole property mortgaged, and sue all the possessors of the property mortgaged for proportional amounts;" and observes that, "this plea has in a manner been already decided in the finding on plea No. 4," and he overrules the plea, and says: "This contention would appear fully refuted on reference to Volume 4 of Wyman's Reports, page 228, which contains the decision of the 26th August 1867." That case is also to be found in 8 W. R., page 379. The learned Judges, no doubt, held in the particular circumstances of that case that, as stated in the head-note, "where a plaintiff's bond gives him a separate lien on each and all of several mouzahs pledged as security, he is free to elect for sale whichever of the mouzahs he thinks most likely to satisfy his claim." But then they go on to observe: "In the present case there was nothing to prevent the plaintiff from purchasing any of the mouzahs pledged to him, and he bought them at the risk of lessening his own security. Whether in his new position as mortgagor of the three mouzahs in which he has purchased the equity of redemption, he is liable for contribution to the holders of the two mouzahs he is now proceeding against is another question, but we know of no law which prevents a transaction of this nature between a mortgagor and a mortgagee." It appears to us, as laid down in the case of *Newell*

*Imut Ali Khan vs. Jowaher Singh and others*, 13 Moore's Ind. p., 404, that the defendants in this case would have been at liberty to insist that the mouzahs which they had purchased could be burthened with no more than a proportionate amount of the original mortgage-debt, and might claim to redeem that mouzah upon payment of that quota, so that if they could have shown that the amount chargeable upon their mouzah was less than Rs. 759, which the plaintiffs claimed, and brought that money into Court, they might have got their mouzah redeemed. That has not been done, nor has any reason been shown to lead to the supposition that, if such an account had been taken, the charge upon the mouzah would have been less than Rs. 759. Under these circumstances, although we do not quite concur in the judgment of the Court below, we think that in substance that decision is right, and this appeal must be dismissed. We think also that each party should pay his own costs of this appeal.

1878  
 HIRDEY  
 NARAIN  
 v.  
 SYUD  
 ATTAULLA.  
 —  
 Judgment.  
 —  
 JACKSON, J.

[CIVIL APPELLATE JURISDICTION.]

KRISTO KISSOR NEOGHY . . . . . APPELLANT;

AND

ADDERMOYE DOSSEE AND OTHERS . . . . . RESPONDENTS.

June 4.

*Letters Patent, section 15—Appeal from Original Jurisdiction—Appeal from an order—Minor—Guardian—Appointment of guardian—Paternal relatives.*

Under section 15 of the Letters Patent of 1865, an appeal lies from an order passed by a single Judge in the Original Civil Jurisdiction of the High Court.

The claims of relatives to the guardianship of a minor, stand upon quite a different footing from those of parents. The nearest paternal relatives have no legal right to the immediate custody of a child on the death of its parents.

In the absence of father or mother, or guardian appointed by the Court, the selection of a guardian for a Hindoo minor is to be made by the Court, as it represents the ruling power.

APPEAL from an order passed by Mr. Justice PONTIFEX in the Original Civil Jurisdiction of the High Court, granting the

1878  
 KRISTO  
 KISSOR  
 NEOGHY  
 v.  
 KADERMOYE  
 DASSEE.

guardianship of a minor to the respondents, on the ground of their being the nearest relatives of the father.

*Bonnerjee*, for Appellant.

*Jackson*, for Respondents.

*Judgment.*

The judgment of the Court (1) was delivered by

GARTH, C.J. :—

In this case, taking the facts as they are stated upon the affidavits, it would appear that one Gour Mohun Soor died leaving a widow Kadermoye, a son, Baney Madhub Soor, by a former wife, and two sons by Kadermoye, namely, Khetter Mohun Soor and Hurry Dass Soor. The family carry on what is called a rattan shop, and, as they appear to have no means except this shop and their family dwelling house, they are probably not in very good circumstances.

Hurry Dass was married to one Koosum Koomaree Dassee, the daughter of Kristo Kissor Neoghy, who is a landholder, and apparently in good circumstances. Hurry Dass died in May 1877, leaving his wife, who was then still a minor, a boy about nine months old, and a girl about 2½ years old. Hurry Dass died in his father-in-law's house, having been removed there shortly before his death, for the purpose of being better attended to. Both children were born in the father-in-law's house, and have always resided there; and the boy is being suckled by a member of the father-in-law's family.

Koosum Koomaree also lived principally in her father-in-law's house during the lifetime of her husband, and, after her husband's death, resided there with her children altogether. Koosum Koomaree died on the 21st December 1877. After the death of Koosum Koomaree, Kristo Kissor Neoghy made some application, through an attorney, to Baney Madhub Soor and Khetter Mohun Soor with respect to the share of the infant children of the family property. The reply to this was that Kadermoye, the grandmother, claimed to be their guardian, but they offered to give an account to Kristo Kissor Neoghy if he were appointed guardian of the infants by the Court. This was followed by

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a letter from an attorney of Kadermoye, claiming for her the custody of the infants as their natural guardian, and demanding that they should be given up to her. This demand was not complied with; and on the 4th February a rule was issued calling upon Kristo Kissor Neoghy to show cause why he should not give up the infants to Kadermoye Dossee, Baney Madhub Soor and Khetter Mohun Soor. Cause was shown, and ultimately an order was made, that the infants should be given up to those three persons. Against this order, Kristo Kissor Neoghy has appealed.

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It has been objected, first, that no appeal lies in this case. That question depends on section 15 of the Letters Patent of 1865, which provides that "an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a sentence or order passed or made in any criminal trial of the Judge,) of the said High Court or of one Judge of any Division Court pursuant to section 13 of the said recited Act." Section 25 directs that "there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of Original Criminal Jurisdiction, which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court." Reading these two sections together, it is very clear to us that the intention of the Letters Patent was only to prevent an appeal in matters of criminal jurisdiction, properly so called. But the matter now before us is not one of criminal jurisdiction, properly so called; although as a proceeding directly between the Crown and the subject it has been sometimes so treated. It is a matter which, according to circumstances, may be made the subject of civil as well as criminal proceedings: and the order appealed against was made by the learned Judge in the Court below, sitting in the Ordinary Civil Court. We have, therefore, no doubt that the appeal lies.

Upon a consideration of the appeal itself, it is not very clear how the respondents put their claim jointly to the custody of the infants. In the correspondence, Kadermoye is put forward as

are as follows :—"Consequently, the meaning is, let him act in such a manner that other heirs may not take the whole, defrauding the infant who is incapable for non-age of conducting his own affairs; or the sense may be, let him commit the share of the minor in trust to any one co-heir or other guardian." The passages referred to by Macnaghten, in the Appendix to Strange's Hindu Law (pp. 73, 74, 75, ed. 1830), are equally clear against the claim of the respondents, and support the view, that in the absence of the father or mother, or guardian appointed by the father, the selection of the guardian is to be made by the Court, which, of course, represents the ruling power. We know of no passage in the Hindu Law which supports the contention of the respondents.

Upon principle, also, it seems to us obvious that the claim of the relatives, both those nearer and those more remote, stands upon a wholly different footing from that of the parents. The child belongs to its parents, but does not belong to its relatives. The affection of a parent is generally so strong, that kind treatment may safely be presumed, until special circumstances leading to a contrary presumption are proved. The kind treatment of another person's child by a relative, however near, cannot be certainly relied upon as in the case of a parent. On the other hand, there are often, in the case of relations claiming to be guardians of children, conflicting considerations which it is impossible to overlook. The nearer relatives are generally those who would succeed to the child's share of the property, if the child died; and to ignore this consideration altogether would be contrary to the Hindu Law, contrary to the opinion of some of the highest authorities in the English Law, and contrary to the principles laid down by the Legislature in this country in various regulations and Acts, which, though not applicable to a proceeding of this nature, cannot be ignored by us in a matter of this kind. The Hindu Law very clearly points, as appears from the opinion already made, to the necessity of protecting the infant against any possible misconduct of the other heirs. The views of English lawyers will be found stated in 1 Blackstone's Commentaries, 461 *et seq.*, and more fully still in 1 Inst., 87b, 88a, 88b, and in the learned notes thereon, where the conclusion comes to

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is, that nearness of blood alone is at best a very exceptionable rule for settling the right of guardianship. Originally, the Legislature of this country absolutely excluded the next heir after the infant from the guardianship of his person (Reg. I of 1793, s. 21); and in the management of the property (s. 8) the claim of the nearest relatives is expressly postponed to other considerations of fitness. Reg. VII of 1799 seems to abolish even this qualified preference. By Reg. I of 1800 the right of the next-of-kin generally to the wardship is recognized, but the heir of the infant is expressly excluded. By Act XL of 1858 any near relative may be appointed guardian, but the preference is by no means necessarily to be given to them; and the whole matter is left to the discretion of the Court. By Act IV (B.C.) of 1870, s. 35, it is forbidden to appoint the next legal heir, or other persons immediately interested in outliving the ward, to be the guardian of his person.

Upon the whole, therefore, we do not think the respondents can be said to have an absolute right to the guardianship of these infants, though if the Court were applied to in a proper way to appoint a guardian, their claim would have to be considered, and we do not at all deny that nearness of blood is an important element for consideration in dealing with such an application.

We think the present application should be dismissed, but we do not desire to preclude any of the respondents, who may think fit to do so, from applying in proper form to be appointed guardian of these infants. If such an application be made, the matter can then be more fully inquired into than it can be now.

Further, we do not wish to be understood as saying, that under no possible circumstances can any person apply for an order to have an infant delivered over to one who is not its parent, and who has not been legally appointed its guardian by the Court or by will. The question in each case is, as we consider, one for the discretion of this Court, which will act in all cases for the benefit of the infant.

The learned Judge in the Court below refers to the fact that the infant is a member of a joint family. We agree that if that



so, that is also a matter to consider. It might in some cases be very desirable that an infant should remain in the joint family; but that consideration does not seem to us to operate very strongly in the present case. In our opinion, the decision of the learned Judge should be reversed, and the rule discharged. The appellant is entitled to the costs of the appeal.

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## [CIVIL APPELLATE JURISDICTION.]

BROJO NATH PAL . . . . . OPPOSITE PARTY;

June 12.

AND

DASMONY DASSEE . . . . . PETITIONER.

*Application for Probate—Grant of Probate—Order to suspend Probate—Appeal from Order—Act X of 1865, section 263—Act VIII of 1859, section 363.*

Where an application for probate has been granted, and, on objection being made, a subsequent order is passed, directing "that the case be re-opened, that probate be suspended," for a time certain, "and that the executor bring in his evidence to prove his right to obtain probate:" *Held*, that no appeal lies from such an order.

Act X of 1865, section 263, and Act VIII of 1859, section 363, discussed.

**REGULAR APPEAL** from an order passed by the Judge of the District Court.

Fariny Churn Pal died on the 31st of May 1874. On the 14th of August 1874, an application was made on behalf of his widow, for a certificate under Act XXVII of 1860. On the 9th of September 1874, a petition of objection was filed by Brojo Nath Pal, together with a copy of the will under which he claimed to be entitled to probate. On the 14th of September, an application for probate of this will was made, and the case was fixed on the 21st of September 1874, that being the day fixed for the trial of the certificate case. A caveat was put in by the widow, Dasmony; but probate was granted, and the application for the certificate refused. The present was an application made on the 14th of January 1877, by the widow, Dasmony, for revocation of the grant of probate, on the ground of its having been obtained

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 —  
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fraudulently, and of the will being forged. The learned Judge of the Court below, having heard evidence in support of the application, directed that the case be re-opened, and that Brojo Nath Pal do bring in his evidence to prove his right to obtain probate. The executor appealed to the High Court, when the objection was taken that no appeal lay.

*Baboo Trilochanath Mitter, for Appellant.*

*Baboo Gopal Lall Mitter, for Respondent.*

The judgment of the Court (1) was delivered by

GARTH, C.J. GARTH, C.J., (McDOWELL, J., concurring):—

We think that the preliminary objection must prevail. The appeal before us is against an order made by the District Judge, that an application for probate should be re-opened.

The suit in which the order is made, is one brought for the purpose of revoking the grant of probate of the will of Taring Churn Pal, deceased, in favour of Brojo Nath Pal, the executor, and the ground of the suit is, that the plaintiff, Dasmony Daskee, who is the widow of the testator, had no notice of the application for probate.

The Judge, upon the hearing, considered that, under the circumstances, the plaintiff ought to have had notice of the probate proceedings. He, therefore, made an order, not that the will should be revoked, but substantially for a new trial of the case, by directing that the application for probate should be re-opened, and that the plaintiff should have an opportunity of making his objections. He directed that the 16th April should be fixed for the trial of the case: that the widow, the plaintiff, should be allowed to bring forward such evidence as she thought proper, and that in the meantime the probate should be suspended.

From this order the executor has appealed, and a preliminary objection has been made to the hearing of the appeal, on the ground that this order is not one against which any appeal can be preferred at this stage of the case. It is argued, that if an appeal lies against such order at all, it would only lie in the event of the probate being revoked upon the re-hearing, viz.

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t might be open to the appellant to take advantage of the order being erroneous.

The appellant on the other hand contends that, under section 363, Act X of 1863, every order which is made by a District Judge by virtue of the powers conferred upon him by that Act, is subject to appeal to the High Court. If he is right in this, it appears to follow that any order which might be made in a probate case, either for the attendance of a witness, or for the production of a document, or any other interlocutory order, might be made the subject, *per se*, of a regular appeal to this Court. We cannot think that this is the meaning of section 363. We consider that its meaning is controlled by the constraining words, which make all appeals under it "subject to the rules contained in the Code of Civil Procedure applicable to appeals."

Then, upon looking at Act VIII of 1859, section 363, we find that "no appeal is to lie from any order passed in the course of a suit, and relating thereto *prior to decree*; but, if the decree be appealed against, then any error, defect or irregularity in any such order, affecting the merits of the case or the jurisdiction of the Court, may be set forth as a ground of objection in the memorandum of appeal." Now, the order which we have to deal with here, and which is made the subject of the present appeal, appears to us to be such an order as is contemplated by section 363. It is like an order admitting a review in an ordinary suit, where preliminary proceeding with a view to a re-hearing of the case.

By this order, the executor is not deprived of his probate. His title to it will depend upon the result of the re-hearing; and, although the probate was suspended in the meantime, that was only for a few days, namely, from the 27th March, when the order was made, to the 16th April, when the re-trial was ordered to take place.

The appellant says that he is injured by this suspension. But instead of appealing to the High Court, by which he has delayed the matter for a year, he had been content to have the case re-tried, according to the order of the Judge, on the 16th April, the delay would have been of little consequence. Instead

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 REGD. V. say whether the order for re-opening the case is a proper subject for appeal. We are of opinion that it is not, and that the objection made by the respondent is well founded. If this order can ever be the subject of appeal, (and we see no reason why it should not in another stage of the case,) this is not the time for appealing against it. The time for doing so would be, if the probate should be revoked upon the re-hearing,—when the executor might appeal against the revocation, and then take the objection that the Judge had no power to re-call the probate or re-open the enquiry. That being so, the appeal must be dismissed with costs.

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I should add, that the objection to the probate being suspended was not taken in the grounds of appeal. The appeal is against the re-opening of the case generally, and no special exception has been taken to the probate being suspended.

[CIVIL APPELLATE JURISDICTION.]

June 14. KHAJAH ASHANOULLAH . . . . . DEFENDANT;  
 — AND  
 KISTO GOBIND DASS AND OTHERS . . . PLAINTIFFS.

*Talook—Ransumption—Right to Possession—Churs—Enhancement—Notice*

A was the owner of a talook in a zemindari which was purchased by the Government at an auction sale for arrears of revenue. The Government did not cancel the talook, but settled it with A for twelve years. When the term was expired, the Government refused to make a new lease with A, and, instead, leased it for a year to B. Held that the refusal of the Government to settle the land with A in any way affected his right to a settlement on the expiration of the lease to B.

When a zemindar sues to enhance the rent of a talookdar, and specifies certain churs as part of the land, the rent of which is to be enhanced, he, by implication, must be considered to admit that the tenant has some valid tenure or right of occupancy in the land mentioned in the notice.

*Dams Soondari Doss vs. Radhika Churn*, 13 W. R., 11 P. 6 cited.

**SPECIAL APPEAL** from a decree passed by the Judge of Tippera, modifying that of the Subordinate Judge of that district, which decreed the plaintiff's suit.

These were six special appeals arising out of three suits, instituted by three sharers of Talook Madoofat Johuruddin. The talook is described as comprising Chur Kadir Kholah No. 154, and Mouzah Bahis Chur No. 137, and Jowar Bukrabad, Pergunnah Burdukhal.

The plaintiffs allege that the talook was created in the year 1220, and the zemindary having been sold for arrears of Government revenue in 1836, the Government became the purchaser. It is alleged by the plaintiffs that after this purchase the Government raised the rent of the talook, but in all other respects the talook was left intact; that while the zemindary was in the khas possession of Government, the rent thereof not having been paid, it was sold under Regulation VIII of 1819, on the 16th of May 1850, and purchased by Kisto Gobind Dass, one of the plaintiffs in these suits (the other plaintiffs are either his co-sharers in the purchase or representatives of the purchaser of a share from him); that after this auction-purchase the settlement was concluded with them for 12 years, which expired in 1268; that the Collector unjustly refused to settle the talook with them for the year 1269, the settlement having been made with one Pran Kisto Dutt; that in the year 1270, the zemindary right having been sold, the defendants Khajah Ashanoollah purchased it; that after his purchase, Pran Kisto's settlement having expired in 1269, the purchaser took possession of the talook; and that in the year 1277, Khajah Ashanoollah relinquished possession in favour of the plaintiffs, but, subsequently, in a suit brought by the plaintiffs against a tenant of the talook, the Khajah defendant again set up his right, and the suit was dismissed on the 4th March 1873. The plaintiffs being thus again dispossessed, the present suit for possession has been brought.

The defendant, Khajah Ashanoollah, pleaded limitation, and alleged that, as the plaintiffs refused to take the settlement at the jumma proposed by the Collector in the year 1269, they have lost all rights to the talook. He further contended in his

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written statement: that after the Government auction-purchase, the old talookdaree right was extinguished, and the plaintiffs and the heirs of the old talookdar were allowed to continue in possession simply as temporary settlement holders, and as the terms of those settlements had expired, they have no right to recover possession. He also objected to the claim for mesne profits. A special objection was taken to the two churs specially named in the plaint, on the ground that they were not part and parcel of the talook as originally formed, but they were the exclusive property of Government, and were simply settled along with the talook for mere convenience of realizing Government revenue.

The Subordinate Judge overruled the plea of limitation, and upon the merits, held, that after the auction-purchase by Government, the old talook was upheld in all other respects, except as to the amount of the rent payable on account of it, and that as regards the churs, the Government officers always treated them in all the settlement proceedings as part of the talook, and allowed to the talookdars *malikana* upon the profits. Upon these grounds he was of opinion that the plaintiffs are entitled to recover possession of the talook with the churs. As regards mesne profits, he held that the claim for 1277 is barred by limitation, and the amount of the claim for the other years might be ascertained in the course of the execution of the decree. He accordingly decreed the claim, excepting the mesne profits for 1277.

On appeal, the District Judge excluded the churs from the decree, on the ground that they were Government properties, and that the settlement proceedings did not confer any right on the talookdars in respect of them. He also entirely disallowed the claim for mesne profits. With these exceptions he upheld the decree of the lower Court. Both parties appealed specially to the High Court.

*Baboo Chander Madhub Ghose and Baboo Doorga Mohan Das* for Appellants.

*Baboo Mohini Mohan Roy, Baboo Bharat Chander Dutt, and Moonashee Serejal Islam*, for Respondent.

The judgment of the High Court (1) was delivered by

**MITTER, J. :—**

[His Lordship stated the facts as set out *ante*, and continued.]

In each of these three cases, there have been two special appeals, one by the plaintiffs and the other by the defendant. Consequently there are six special appeals before us. In all the three special appeals preferred by the plaintiffs, the questions raised are identical, which is also the case in the other special appeals preferred by the defendant.

The first objection raised in the defendant's appeals is, that the plaintiffs' claim is barred by limitation. As regards the limitation of 12 years, the finding of the lower Courts that the plaintiffs have proved their possession within that time, must dispose of it finally, and no question with reference to it can arise in special appeal. But the defendant also contends that the plaintiffs' claim is barred by limitation, because they did not bring any suit within three years from the 26th June 1862, the date on which the Collector refusing their prayer for settlement granted the talook in ijara to one Pran Kisto Dutt. The lower Courts have overruled the objection, and we think rightly. In the first place, there was no award within the meaning of the Limitation Act, the Collector had not to decide between contending claimants to settlement who based their respective claims on conflicting rights. The plaintiffs were called upon to engage for a higher jumma, which they refused to do; and the talook was settled for one year with Pran Kisto, who agreed to pay the jumma, consequently there was no award by any revenue authority. In the next place, the order of the revenue officer related only to the question of settlement for one year, and could not in any way affect his right to ask for settlement again after the expiration of that term. It is in this view the Board of Revenue refused to enter into the merits of the appeal which was preferred by the plaintiffs against the Collector's order. We are, therefore, of opinion that the lower Courts have rightly overruled this objection.

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—  
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The next objection taken by the defendant refers to certain villages which are not to be found in the talookdary pottah of 1220. This objection was not taken in the Court of First Instance, nor in the petition of appeal before the lower Appellate Court. It seems to have been the first time raised in the course of argument before the lower Appellate Court. The plaintiffs brought these suits to recover possession of Talook Madoofat Johuruddin, in Jowar Bukrabad. They did not mention in the plaint the names of the villages which constituted this talook. From the documentary evidence which they adduced in support of their claim, it transpired that the mouzahs mentioned in the pottah of 1220, by which the talook was first created, do not correspond with the mouzahs which have been taken by the settlement officers as constituting this talook. The objection of the special appellant is, that those mouzahs which are mentioned in the settlement proceeding as part of the talook in question, but which are not to be found in the pottah of 1220, should be excluded from the decree in the plaintiffs' favour. In point of fact there is no express decree for these mouzahs, because what had been decreed is simply the talook without any specification of the names of the mouzahs. As the objection was raised before the lower Appellate Court, it should have been made clear as to the meaning of the decree in this respect, otherwise the question might be raised again in the execution of the decree.

With reference to the objection itself, we think the lower Appellate Court was right in overruling it. The Government officers treated the talook as consisting of certain villages mentioned in the settlement proceedings; the plaintiffs are auction-purchasers of this talook, and the auction-purchase was held at the instance of Government under Regulation VIII of 1819. The defendant has simply purchased the rights of Government in the zemindary. He must, therefore, be bound by these proceedings held by officers of Government. We are of opinion that the special appeal of the defendant must wholly fail.

In plaintiffs' special appeals two questions have been raised. First, that the lower Appellate Court is not right in not considering the churs as part of the talook; secondly, that that Court is equally wrong in refusing to award meane profits to the plaintiffs.



regards the last question, the decision of the District Judge is as following effect : "On the matter being urged by both sides, it appears to me that the plaintiffs are not entitled to any wasilat.

They were not in possession at the time Ashanoollah purchased the ryot, as they had refused to accept the last settlement offered by Government.

Again, they did not come forward to accept a settlement with Ashanoollah when invited by the notice ; as stated in the body of this judgment, the first step taken by them was to sue a ryot for rents with the evident view of regaining their possession. Until they had come forward and agreed to a settlement they had no right to possession." We think the judgment of the District Judge is wrong on this point. The plaintiffs' right to the talook has been established by the decision of the Courts below. Consequently there must be restitution of the profits of the talooks to the plaintiffs—profits which they put any right the defendant has realized. The facts that the plaintiffs were not in possession at the time when Ashanoollah purchased, or their refusal to take the settlement in 1862 by the Collector, cannot affect the question of mesne profits claimed in this case, which relate to a period long subsequent to Ashanoollah's purchase, or the time when the plaintiffs refused to take the settlement.

The only other reason given by the District Judge in refusing to award mesne profits is that the plaintiffs had no right to possession of the talook "until they had come forward and agreed to a settlement." If this were correct, the District Judge should not have decreed the present suit for possession, because up to this time the plaintiffs have not come forward and agreed to take a settlement. But the District Judge is not right in the view laid down above. The plaintiffs' right to possession rests upon their talookdary right recognized and upheld by Government after their auction-purchase. Their refusal to accept the talook with the zemindar at a particular rate of rent does not deprive them of their right to possession. The zemindar can only have recourse to legal means provided by the Legislature of the country to enforce his right by enhancing the rent. The Judge's decision upon this point is wrong, and I am of opinion that the plaintiffs are entitled to mesne profits.

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The Subordinate Judge, as already stated, has left the question of the amount of the mesne profits to be ascertained in the course of the execution of the decree. The learned counsel for the defendant stated that this should not have been done, and the amount should have been fixed in these suits as there are materials upon the record for that purpose. Following the ruling in 18 W. R., p 469, he has asked us to allow mesne profits at the rate of the malikana allowed to the talookdar in the settlement rubocaries upon the assets of the talook as ascertained in the course of these settlements. In the case quoted this course was adopted upon consent of parties. No such consent has been given in this case. If the defendant during his possession has collected more than the assets shown in the settlement papers, the plaintiffs are entitled to an account from him of what he has collected. Besides, in this case, the defendant after restoring the talook to the possession of the plaintiffs thought fit to dispossess them which were not the facts in the case cited before us. We think, therefore, that the decree of the Subordinate Judge upon this point is correct.

Then as regards the other question relating to the two churs which have been excluded from the decree. The District Judge thinks they were island churs within a navigable river, and therefore belonged to Government as matter of right. As regard one of them, the resumption rubocary shows that it was in the river Megna surrounded on all sides by water.

Under Regulation XI of 1825, an island chur would not be the absolute property of Government unless it was surrounded on all sides by unfordable water. This fact was not found in the resumption rubocary mentioned already. The resumption rubocary of the other chur shows that it was not surrounded on all sides by water. The District Judge further thinks that there is nothing in the record to show that the Government intended to confer upon the talookdars the same rights regarding these churs as they intended to confer upon them with reference to the other lands of the talook. He is further of opinion that the notice served by the defendant upon the plaintiffs now admits the latter's right to possession in these churs.

It seems to us that the District Judge is wrong in both the

ints. The churs were resumed while in possession of the then lookdars of Jowar Bukrabad under the provisions of Regulation II of 1819 with the object of assessing revenue upon them. If they are island churs entirely at the disposal of Government under the provisions of Regulation XI of 1825, it is more likely that a suit for possession would have been brought against the person in possession without title. Then, we have on the record a document in the form of a return to some superior officer, in which the collector, Mr. Metcalf, states that these churs are accretions to Jowar Bukrabad. In the settlement proceedings the revenue officers treated these churs as part of the talook, allowing malikana in respect of these lands to the talookdars. The whole talook, including these churs, was sold at the instance of Government under Regulation VIII of 1819, in the year 1850, and purchased by the plaintiff, Kisto Gobind. In the previous year, i.e., 1849, the term of the settlement under which the defaulting talookdars held the talook including these churs had expired; these are circumstances from which it is quite clear that the Government intended to confer upon the talookdar the same right in respect of these churs as in respect of the other lands of the talook. The Government having incorporated these churs as part of the talook Bukrabad, *primâ facie*, the talookdar's right regarding them must be considered identically the same as in respect of the lands of the talook, unless the contrary is proved.

Then as regards the effect of the notice of enhancement served upon the defendant upon the plaintiffs—Their Lordships of the Judicial Committee of the Privy Council have observed in the case of *Bama Sundari Dassee vs. Radhica Churn and others*, p. 11, in Council Rulings of the 13th W. R., that a suit to enhance revenue assumes that the defendant has some valid tenure or right of occupancy in the lands which are the subject of the suit." A notice of enhancement is a preliminary proceeding to such a suit, and where a talookdar issues such a notice upon a tenant, he by implication must be considered to admit that the tenant has such rights as are mentioned above in the lands covered by the notice. We are of opinion that the decision of the lower Appellate Court upon this point is also wrong. It is, therefore, evident that upon the

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two points in which the District Judge has altered the decree of the lower Court, his decision is erroneous. The decrees of the lower Appellate Court must accordingly be set aside, and those of the Court of First Instance in these three suits must be restored. The result is that the plaintiffs' special appeals must be allowed with costs, and the defendant's special appeals will be dismissed with costs.



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A Magistrate is not limited to passing an order of arrest or conviction after a charge has been drawn up. There is nothing in the explanation of section 220 of the Code of Criminal Procedure which prevents a Magistrate from committing a person for trial by the Court of Session even if the charge has been drawn up and the witnesses for the defence have been examined. "Trial," as defined in section 4, means the proceedings in Court after a charge has been drawn up and section 220 empowers a Magistrate to do so at any stage in the proceedings in a trial. *In the matter of KUDRUTOOLIA AND OTHERS* ... 2

Commutation of Sentence. See DEATH, EXECUTION OF SENTENCE OF ... 215

**Compensation for Illegal Impounding of**

Cattle. See CATTLE, ILLEGAL IMPOUNDING OF ... 344

**Condition Precedent—Mercantile Contract—Construction of Contract—Shipping Order.]**

On the 16th of February 1877, A contracted with B for the shipment of a cargo of 1,800 tons of wheat to London, by a ship of B's, then at sea. The shipment was to take place on notice in May or June, "after completion of two country voyages." *Held*, that, on a true construction of the whole contract, the latter clause must be taken to be a condition precedent; and the ship not having completed two country voyages, within the meaning of the stipulation, A was entitled to refuse to carry out his part of the contract. A party who has entered into a written contract is *prima facie* entitled to have a literal construction put upon that contract; and the fact that the adoption of a literal construction would enable him to get rid of a bargain which he has found to be disadvantageous, is no reason for rejecting it. The proper mode of construing a mercantile contract is, first, to ascertain the meaning and legal effect of the document as it stands, and then apply the facts of the surrounding circumstances which ordinarily it would be the province of a jury to find. **BEHN v. BURNES**, 3 B. & S., 751; and **HOWES v. SHAND**, 2 Ap. Cas., 455, cited and followed. **NICOL FLEMING & Co. v. KNOXES** ... 169

Conditional Limitation. See GIFT, DEED OF ... 339

**Confessions to Magistrate—Misconduct of**

*Police—Conviction solely on confessions to Magistrate.*] Where the only evidence in a Sessions trial was confessions made to a Magistrate, but subsequently retracted, and it was established that the Police misconducted themselves in the search of the houses of the prisoners who confessed and others under trial, and produced evidence which was rejected as false, it was held that the prisoners could not safely be convicted on their own statements without any corroboration. **SUFIRUDDIN, In the matter of** ... 182

Confidential Communication. See ARBITRATION ... 488

Confirmation of Award. See ARBITRATION ... 488

Confirmation of Sale. See SALE (2) ... 384

Consent Decree. See MAHOMEDAN LAW (2) ... 223

Consideration for which note was made. See BILLS OF EXCHANGE ... 409

Consideration, Failure of. See SHERIFF'S SALE ... 529

Construction of Contract. See CONDITION PRECEDENT ... 169

See EFFECT OF ... 81

Construction of Grant. See GIFT, DEED OF ... 339

**Constructive Trustee.** See SALE OF PATHI TALOOK ... 419

**Contract.** See CONDITION PRECEDENT ... 169

**Contract Act.** See PRINCIPAL AND SURETY ... 455

———— See MINOR, LIABILITIES OF 249

**Contract to sell at a fair valuation.** See SPECIFIC PERFORMANCE ... 288

**Contract of Indemnity.** See IMPLIED CONTRACT ... 388

**Contrary Finding.** See HIGH COURT ... 1

**Contribution, Suit for—Joint Decree—Primary liability of Plaintiff—Non-liability to contribute** [Where a joint decree, passed against several defendants, has been satisfied out of the property of one of them, then, in a subsequent suit for contribution brought by the latter against her co-defendants in the former suit, there is nothing to prevent the defendants from showing that as between themselves and the plaintiff the latter alone was liable to satisfy the decree in the former suit, and that consequently, they are not liable to contribute. *AAMAR SINGH v. MUSAMUT AJNAS KORA* ... 406

———— See INVOLUNTARY PAYMENT 414

**Conviction.** See EXAMINATION OF ACCUSED 317

**Conviction solely on Confessions.** See CONFESSIONS TO MAGISTRATE ... 182

**Copy of Judgment.** See MOOKHTAR ... 553

**Corporation.** See RELIGIOUS TRUST (2) ... 121

**Corporation of Calcutta.** See PUBLIC SERVANT ... 520

**Co-sharers.** See PRE-EMPTION ... 319

**Costs—Interpretation of Decree—Separate defences—Separate sets of costs—Alteration of decree in execution.** [Where a decree of the High Court directed that the respondent (the plaintiff) should pay to the appellants (the defendants) "the costs incurred by them in the lower Court: Held, that the costs referred to were those which were specified in the decree appealed against as the costs incurred by the defendants. If several defendants have severed in their defence, and the lower Court has specified the costs incurred by each of them, the costs payable under the above directions will be their several costs. If they have joined in their defence, or though they have severed their defence, but the lower Court has specified a single set of costs as the only costs which it will allow or treat as costs in the suit, then the costs payable will be the single set of costs. Under the Code of Civil Procedure it is the duty of the first Court to ascertain the costs of suit, i.e., the costs of all the parties to the suit; but when the first Court does not consider that the defendants have properly severed in their defence and properly em-

**Costs—continued.**

ployed different advocates, the Court ought not to allow more than one set of costs to the defendants, and should only specify in its decree the costs so allowed. Where the lower Court has improperly awarded separate sets of costs to defendants who have severed in their defence, the attention of the Appellate Court should be drawn to this circumstance before the decree in appeal is passed. It is too late to raise the objection when this latter decree is being executed. *RAM CHUNDER SEN v. KOOBAR DOOMRA NATH ROY* ... 152

———— See REGULAR SUIT TO SET ASIDE SUMMARY ORDER ... 504

**Court of Revision.** See PENAL CODE, SECTIONS 406, 409 ... 516

**Court Fees.** See CATTLE TRESPASS ACT 507

**Court Fees' Act, 1870.** See PROBATE ... 420

**Crown, Exclusion of.** See MAHOMEDAN LAW ... 420

**Culpable Homicide not amounting to Murder.** See MURDER ... 420

**Damages, Suit for, upon a decree.** See INTEREST AFTER DECREE ... 182

**Damages, Suit for.** See JOINDER OF PARTIES ... 182

**Darpatni.** See INJUNCTION, RIGHT TO ... 507

**Death, Execution of Sentence of—Probable accident in execution—Sentence commuted.** [Where the condition of the convict renders it likely that, if he were hanged, decapitation would ensue, the sentence of death was commuted to one of transportation for life. *BOON JOLAH* ... 420

**Death of a party—Section 530, Code of Criminal Procedure** [On the death of one of the persons concerned in a matter under section 530 of the Code of Criminal Procedure, just before the proceedings terminated in favour of that party, and another, though it would be more regular for the Magistrate to postpone the proceedings and make his representative a party in his place, the proceedings are not necessarily bad since death has prejudiced no one. *In the matter of SREEMUTTY RANER ANONDOMOYEE DEBBI* ... 420

**Debts of Deceased.** See MINOR, LIABILITIES OF ... 249

———— See MAHOMEDAN LAW ... 420

**Deceased Judgment-Debtor.** See EXECUTION ... 420

**Declaratory Decree.** See JAMES ... 420

———— See BENAMAS TRUST ... 420

**Decree.** See EXECUTION ... 420

**Decree against Joint Defendants.** See EXECUTION PROCEEDINGS BARRED BY LIMITATION ... 471

**Decree, Amendment of.** See PARTY TO SUIT ... 461

**Decree of Appellate Court.** See MINOR 440

**Decree for Share of Rent.** See ALIENATION DURING ATTACHMENT ... 325

**Decree for Kabulyat at rate fixed by Court.** See KABULYAT, SUIT FOR ... 8

**Decree by Consent.** See MAHOMEDAN LAW (3) ... 223

**Deed, Re-forming a.** See RE-FORMING A DEED ... 156

**Defaulting Co-Sharer.** See SALE OF FATNI TALOOK ... 419

**Deforcement.** See GIFT, DEED OF ... 389

**Delay.** See PARTY TO THE SUIT ... 545

**Denial of Tenancy in former suit.** See EJECTMENT, SUIT FOR (2) ... 208

**Dependent Talook.** See ESTOPPEL ... 216

**Deposit.** See EXECUTION (3) ... 206

**Determination of Tenancy.** See EJECTMENT, SUIT FOR ... 209

**Detinue.** See SUIT FOR PAPERS ... 17

**Diluvion.** See RE-FORMATION ON OLD SITE. 39

**Discharge by Magistrate of persons sent in by Police.** See SUMMARY TRIAL ... 374

**Discharge of Surety.** See PRINCIPAL AND SURETY ... 455

**Disclaimers.** See EJECTMENT, SUIT FOR (2). 206

**Discount.** See INTEREST DEDUCTED IN ADVANCE ... 349

**Distinct Accounts.** See RELINQUISHMENT OF PART OF CLAIM ... 285

**District Judge of Akyab.** See INSOLVENCY JURISDICTION ... 485

**Document requiring in Stamp.** See STAMP [439]

**Document admitted by Court of First Instance.** See STAMP ... 439

**Domicile.—Succession.—Act X of 1865, sections 10, 13.—East India Company's Service.—[Service of the Crown.]** A medical officer who came out to India in the service of the East India Company in 1850, who was transferred to the service of the Crown by the Act of 1858, 31 and 32 Vict., c. 108, and who died in that service, in Calcutta, in the year 1878, must be considered as having had an Anglo-Indian domicile at the time of his death. WAUCHOPE v. WAUCHOPE, Court of Session Reports, 4th Series, Vol. 4, p. 945, cited and followed. In the goods of JOHN ELLIOTT ... 496

**Duty not payable when Probate first granted.** See PROBATE ... 436

**Duty of Appellate Court.** See CODE OF CRIMINAL PROCEDURE, SECTION 227 ... 511

—See EJECTMENT [81]

**Easement—Right of Way—Watercourse—Onus—Magistrate's order—Code of Criminal Procedure, section 532.]** Where the right to have a way or watercourse over certain land is disputed by the owner thereof, and an order under section 532 of the Code of Criminal Procedure has been passed by the Magistrate in favour of the person claiming the right, the fact of such an order having been made will not be sufficient to relieve the latter from the onus of proving the claim, in a subsequent suit by the owner to establish his right to the exclusive use of the land. PUGHAI KHAN v. ASAD SIDDAR, 21 W. R., 140, overruled. OBHOY CHURN DUTY v. LUKHY MONER BEWA ... 555

**2.—Servitude—Right to flow of water.]** Where A has a right to discharge the surplus rainfall from his land on to the land of B, no length of time will give B a right to compel A to send the water on; provided that A does not interfere with any portion of the water which flows from his land to that of B in a natural and defined channel. The servient owner cannot prevent the dominant owner from putting an end to the servitude at any time he may think proper. KHOORSHED HOSSEIN v. TEENARAIN SINGH ... 141

**3.—See LIGHT AND AIR ... 377**

**East India Company's Service.** See DOMICILE ... 496

**Ejectment—Jus tertii—Objection first raised in grounds of appeal—Duty of Appellate Court—Joint Hindu Family—Construction of Contract—Reversion—Mitakshara Law.]** Plaintiff in ejectment must recover by the force of his own title; and a defendant may defend his possession by setting up a *jus tertii*. It would be in the highest degree unjust to allow a defendant, who has been for nearly the whole time of prescription in possession of property of which he claims to be a purchaser for value, to be turned out of possession by any person other than one who had established a clear title to present possession. Plaintiff brought a suit for ejectment and obtained a decree. The defendant appealed, and in the grounds of appeal raised, for the first time, an objection that the plaintiff had no *locus standi*. This objection was based on facts which came out in the course of the plaintiff's cross-examination. The High Court refused to consider the objection, on the ground that it should have been taken in the Court below. Held, that if there were not sufficient materials before the Court to enable the learned Judges to decide the question thus raised, they ought

**Ejectment—continued.**

to have directed an issue, in order that the facts essential to such determination should be ascertained. A and B, members of the same joint Mitakshara family, being under an erroneous impression that the legal effect of the happening of a certain event would be to vest in A the seminary of Shivagunga, entered into an arrangement whereby A agreed that, on the happening of the event, he and his offspring should have no interest in the seminary of Padamattur; that B alone should be the seminary and rule and enjoy the same. The event referred to did happen, but the seminary of Shivagunga did not vest in A, whose son brought a suit for ejectment against the assignees of the son of B. *Held*, that the true construction of the agreement cannot be affected by what happened subsequently, and that it must be considered by the light of the circumstances as they existed at the time of its execution; that the effect of the arrangement was the same as if there had been a partition between A and B in which the property had fallen to the lot of B. **PERIASAMI alias KOTTAI TEVAR v. SALUGAI TEVAR** ... 31

**Ejectment, Suit for—Determination of tenancy—Onus.** Where a landlord sues to eject a ryot on the ground of his tenancy having expired, the tenant is not called upon to state the character of his tenancy until the plaintiff has given *prima facie* proof that it is of a terminable character and that it has terminated. A sued to eject B, on the ground that a temporary settlement effected with him had expired. B set up a *guzasthi* title to the land. The lower Court disbelieved plaintiff, but called on B to support the title he had set up, and, he failing to do so, gave A a decree. *Held*, that A's suit should have been dismissed when it was found that the evidence he put forward was unworthy of credit. **BULLER ANNER v. NISHAN SINGH** ... 309

2.—**Trespasser—Denial of Tenancy in former suit—Disclaimer.** A sued B for arrears of rent. B denied that he was A's tenant, whereupon A withdrew the suit and brought one for ejectment, on the ground that he was the owner of the land, and that B by his denial of the tenancy, had lost all claim to be treated otherwise than as a trespasser. It having been proved that the land belonged to A: *Held*, that he was entitled to a decree for possession. **DANES MISSE v. MUNGUN MEAH** ... 308

**Endowment.** See PARTITION, RIGHT TO 310

—See RELIGIOUS TRUSTS ... 128

**Enhancement—Talook—Resumption—Right to possession—Churn—Notice.** A was the owner of a Talook in a seminary which was purchased by the Government at an auction-sale for arrears of revenue. The Government did not cancel

**Enhancement—continued.**

the talook, but settled it with A for twelve years. When the term was expired, the Government refused to make a new lease with A, and, instead, leased it for a year to B. *Held*, that the refusal of the Government to settle the land with A in no way affected his right to a settlement on the expiration of the lease to B. When a *semindari* sues to enhance the rent of a talookdar, and specifies certain churns as part of the land, the rent of which is to be enhanced, he, by implication, must be considered to admit that the tenant has some valid tenure or right of occupancy in the land mentioned in the notice. **BAMA SOONDARI LOMSE v. RADHICA CHURN, 13 W. R., 11 P. O., cited. KRAJAH ASHANGOLLAH v. KIRI GORIND DASS** ... 529

—See KABULIAT, SUIT FOR ... 8

—of rent.—Service of notice—

Waiver by conduct—Grounds not taken in appeal—

Matter of law—Substitution of party to suit—

Special Appeal—Act VIII (B C) 1869, section

14.] Plaintiff sued to recover rents at enhanced

rates after notice, and got a decree. Defendant

appealed on the merits, tacitly accepting the find-

ing of the lower Court that notice had been duly

served. In appeal, the Subordinate Judge, on

his own motion, took up the question of notice

decided that it had not been duly served, and

reversed the decree of the lower Court. *Held*, that

the Subordinate Judge was wrong; for, in

finding that the defendants had not appealed from

the finding of the first Court, which declared that

there had been good service, it might fairly

presumed that they had due notice of the order

to enhance, until evidence sufficient to rebut the

presumption should be shown. An objection

that notice of enhancement has not been properly

served is not an objection purely of law, but a

mixed objection of law and fact which may

be impliedly waived by the conduct of the parties.

**CHUNDER MONER DASSER v. DEBONEDRIS L.**

**HOORY, 7 W. R., 2; cited and distinguished.**

It is not correct to substitute the assignees of the

original plaintiff as the plaintiff on the record,

the proper course being to add him as a joint

plaintiff if he desires it. Where, however, the

substitution was made before judgment in the

first Court, and was not objected to, and there

no allegation that any party had been prejudiced

thereby, the error will not be considered in an

appeal. **JUDHOPUTTER CHATTERJEE v. CHITRA**

**KANT BHUTACHARJEE, 9 W. R., 809; 811**

**ROY v. CHONES SINGH, 9 W. R., 487; corrected**

and explained. **BRUBER BROOCHER VAKH**

**MUDDON MOHUN CHATTOPADHYA** ...

—See KABULIAT ...

—See BUILDING LANDS ...

—by Joint Landlord ...

JOINT LANDLORD, RIGHT OF ...

**Equitable Relief.** Where a party, who, on

facts really stand, would be entitled to equity

**Equitable Relief—continued.**

relief, misrepresents his case, falsely charges the opposite party with fraud and collusion, and does not rely on his equitable rights, he will be debarred by such conduct from obtaining any relief in a Court of Equity. *DULI CHAND V. MONOHUR LALL UPADHYA* ... 18

— See UNCONSCIONABLE BARGAINS 433

— Assignment. See MORTGAGE (1) ... 18

Error affecting the merits. See REVIEW OF JUDGMENT ... 257

— in granting Review. See REVIEW OF JUDGMENT ... 257

Erroneous Order. See SALE (2) ... 334

Estate Tail. See GIFT, DEED OF, UNDER HINDOO LAW ... 339

Estoppel—Sale for Arrears of Revenue—Auction-purchaser from Government—Dependent Talook—Talookdary Right.] At a sale for arrears of revenue, Government purchased a pergunnah containing a certain talook belonging to A. The talook was not cancelled, and the Government made successive temporary settlements with A in which his talookdary right was recognised. The right and interests of Government in the pergunnah were afterwards sold to B, who ousted A. A afterwards joined with C in taking a patti lease of the same land which he had in the talook. *Held*, in a suit by A against B and C, that this conduct estopped him from recovering possession of the dependent talook from which he was ousted by B. *KHAJAH ASANULLAH V. OSHOY CHURN ROY*, 13 Moore's Ind. App., 317; 13 W. R., 24; cited and distinguished. *GOOROO PERSHAD CHUCKERBUTTY V. RAMNATH CHUCKERBUTTY* ... 216

— See EXECUTION PROCEEDINGS BARRED BY LIMITATION ... 471

— See IMPERFECT TITLE ... 382

— See PRIVY COUNCIL DECREE ... 323

— See ZURIPESHI MORTGAGE ... 547

Evidence. See TRIAL OF DIFFERENT SUITS TOGETHER ... 33

— See WASTE LAND ... 364

— See BILLS OF EXCHANGE ... 409

— See REGISTRATION ... 428

— of Original Consideration. See BILLS OF EXCHANGE ... 409

—, Presumptive. See PARTITION, RIGHT TO ... 310

Examination of accused—Sections 324 and 326, Code of Criminal Procedure—Admission of accused—Conviction—Examination irregularly recorded.] A Magistrate is competent, under section 324, Code of Criminal Procedure, to convict

**Examination of accused—continued.**

an accused person, on his admission of his commission of the imputed offence. The legality of a conviction, so obtained, does not depend on the regularity of the record of any examination afterwards taken. *In the matter of CHUMMUR SHANA* ... 317

— Irregularly recorded. See EXAMINATION OF ACCUSED ... 317

Excess Payments under a Decree, Suit for—Refund of money paid in consequence of a decree which has been reversed—Limitation—Act IX. of 1871, sch. II, Art. 118—Interest.] A got a decree against B for rent at an enhanced rate, on the 29th of June 1863, which decree was affirmed both in regular and special appeal, but was reversed by the Privy Council on the 5th of May 1873. Between the two dates just mentioned, A got sixteen other decrees for rent at the enhanced rate, based on the original one of the 29th of June 1863. A Full Bench having ruled that a suit for a refund of the excess rent would lie: *Held*, that such a suit must be brought within six years, under Act IX. of 1871, sch. II., cl. 118 (Act XV of 1877, sch. II, cl. 120): *Held*, also, that under the circumstances no interest would be allowed on the money paid in excess. *KALI CHURN DUTT V. JOGESH CHUNDER DUTT* ... 354

Excessive Recognizance. See FORFEITURE OF RECOGNIZANCE ... 406

Exclusion of the Crown. See MAHOMEDAN LAW ... 45

— of Widow. See MITAKSHARA LAW ... 323

Execution Proceedings barred by Limitation—Regular Suit to set aside Execution Proceedings—Execution case struck off—Act XXIII of 1861, sec. 11—Estoppel—Decree against joint defendants—Appeal by one of several defendants against part of a Decree—Limitation.] A having obtained an order for the reversal of certain execution proceedings instituted by B, on the ground that they were barred by limitation, and carried on fraudulently without his knowledge, B had that order set aside on appeal, on the ground that there was no execution case before the Court, in which such an order could be made. A then brought a regular suit to set aside the execution proceedings, when B objected that a regular suit would not lie under the provisions of section 11, Act XXIII of 1861: *Held*, that B was estopped from taking that objection in the present suit. Where a decree for possession of certain property is made against three persons jointly, one of whom appeals against the decree only so far as it affects himself and not against the whole decree, and the decree does not relate to property in respect to which the defendants have a common interest and a

**Execution Proceedings, &c.—continued.**

common defence, so that an appeal by one would imperil the whole decree, then the fact of one defendant having appealed will not prevent limitation running in favour of the others, against the execution of the decree. *HUM PRASHAD ROY v. BHAYAT ROSETH* ... 471

**Execution, Alteration of Decree in. See Costs** ... 163**Execution of writ without Jurisdiction. See SHERIFF'S SALE** ... 559

**Execution—Execution of a decree which is afterwards set aside—Money Paid—Restitution.]** A sued B for possession. The suit was dismissed in the Court of First Instance, but, on appeal, the lower Appellate Court gave A a decree, in execution of which A was put in possession. B appealed specially to the High Court, who remanded the case to the Court below for a re-trial, the result of which was that the original decree dismissing the suit was affirmed. In execution of this decree, B applied for compensation in respect of the time during which A was in possession: *Held*, that he was entitled thereto; for where property has passed in execution of a decree which is afterwards set aside, the Court which gave possession is bound to make complete restitution. *NURSING CHUNDER SEIN v. BIDYABHUT DASS*, 2 W. R. 176; *HURRO CHUNDER ROY CHOWDHURY v. SHROBODHONER DEBIA*, 9 W. R. 407; *CHOWDHURY SHIB NARAIN v. CHOWDHURY KINHOSE NARAIN*, 10 W. R. 181; *SYUD ARDPOOL JALEEL v. KALLER KOOMAR DUTT*, 6 W. R. 3 Misc.; *BIBER HAMIDA v. BIBER BRUDHUN*, 20 W. R. 239; *BAMA SOONDCHER DASS v. TARINER KANT LAHOORE*, 30 W. R. 415; *GOONOO DASS ROY v. STEPHENS*, 21 W. R. 195; *DULBERT GORAIN v. REWAI GORAIN*, 22 W. R. 435; and *UNUNT RAM HASRAH v. KURALEE PRASHAD MITTER*, 23 W. R. 441; cited and followed. *SADASIYA PILLAI v. RAMALINGA PILLAI*, 24 W. R. 193; *DIGAMBER DASS v. NUNDOPAL BANERJEE*, 1 W. R. 1 Misc.; *HURU MOHINER CHOWDHRAIN v. DHUN MOHINER CHOWDHRAIN*, 10 W. R. 63; *JANOKER NATH MOOKERJEE v. RAJ KRISHO SINGH*, 15 W. R. 292; *SYUD SHAH AMBER AHMED v. SYUD SHAH ZAKHER AHMED*, 18 W. R. 122; *SHROBODHONER CHOWDHRAIN v. MANSON*, 22 W. R. 160; *KALER NATH DASS v. RAJAK MEAH*, 22 W. R. 406; and *FORESTER v. SECRETARY OF STATE*, L. R. 4 Ind. App. 127; cited and distinguished. *LATI KOONER v. SARODMA KOONER* ... 75

**2.—Execution of Decree against heirs of the Debtor—Heirs substituted as parties to the suit—Property of Deceased Debtor—Issues—Section 203, Act VIII of 1859.]** Where the defendant in a suit for the payment of money died before decree, his sons were made parties, and a decree for the debt due by the deceased was given against them. In execution of this decree the decree-holder attached certain property

**Execution—continued.**

in the hands of one of the sons, who objected on the ground that it was his self-acquired property: *Held*, that the proper issues to be determined were: (1) Whether the property attached by the decree-holder had formed a part of the estate of the deceased debtor; and, if not, (2) whether, if it is separate property of the son, that son has misapplied any property received by him from his father, and, if so, to what extent. *MOORAKH SINGH v. PURYAG SINGH* ... 169

**3.—Security for Performance of Decree—Deposit—Execution barred by Limitation—Act VIII of 1859, section 238—Limitation.]** B appealed from an order passed in execution of a decree obtained by A against B. The appellate Court granted a stay of execution on security being furnished. Thereupon C on behalf of B deposited money and ornaments which were accepted as sufficient security. The appeal was dismissed, but no further proceedings in execution were taken, and the decree became barred by limitation. After the decree became barred, C applied for the return of the money and ornaments, but his application was rejected. *Held*, on appeal, that the application was rightly rejected, as the money and ornaments must, under the circumstances, be taken to have been held by the Court on behalf of the judgment-creditor. *RAHUT HOMERIN, Petitioner; SIBBO GHOSH SARK v. KHUS LALL* ... 170

**4.—Application to keep in force a decree—Application for sale of properties and attachment—Application for transfer—Limitation Act, IX of 1871, Sec. II, cl. 167.]** An application for the sale of certain properties already under attachment under an order made on a previous application by the same decree-holder, is not an application to keep in force a decree within the meaning of the Limitation Act, IX of 1871, Sec. II, cl. 167. Neither is a mere application for a certificate of transfer in order to have the decree executed against property of the judgment-debtor within the jurisdiction of another Court. *RAM SOODH SANYAL v. GOPESWAR MUSTAFEE* ... 171

**See INSTALMENT, SATISFACTION OF DECREE BY** ... 172

**Execution of Joint Decree—Execution by one of the decree-holders—Money had and received—Limitation Act, IX of 1871, sec. II, cl. 60.]** A and B obtained by A and B was transferred to B to C without the knowledge of A. C executed the decree; and A subsequently sued C for share of the proceeds: *Held*, that A had no cause of action against C, but against B, and that suit should have been dismissed. *Held*, further, that if A would have any cause of action against C, it would be for money had and received to use; and the suit would be governed, as to limitation, by Act IX of 1871, sec. II, cl. 60. *WIBON ALI v. GODDAI BAHARI* ... 173



- Execution case struck off.** See **EXECUTION PROCEEDINGS BARRED BY LIMITATION**, ... 471
- Execution of decree.** See **INJUNCTION, RIGHT TO**, ... 288
- Execution of a decree which is afterwards set aside.** See **EXECUTION (1)**, ... 75
- Execution of decree against Heirs of Debtor.** See **EXECUTION (2)**, ... 189
- Execution barred by Limitation.** See **EXECUTION (3)**, ... 208
- Execution by one of the decree-holders.** See **EXECUTION OF JOINT DECREE**, ... 165
- Execution of decree.** See **INSTALLMENTS; SATISFACTION OF DECREE BY**, ... 143
- DECREE ... See **PRIVY COUNCIL**, ... 322
- DECREE ... See **INTEREST**, ... 183
- DECREE ... See **SALE (1)**, ... 260
- DECREE ... See **MANAGER, APPOINTMENT OF**, ... 185
- Execution at instance of Judgment-debtor.** See **PARTITION, DECREE FOR**, ... 187
- Executory Devise.** See **GIFT, DEED OF, UNDER HINDOO LAW**, ... 339
- Express Trust.** See **ADVERSE POSSESSION**, ... 112
- Express Trustees.** See **ADVERSE POSSESSION (2)**, ... 112
- Extinguishment of Superior Tenure.** See **IMPERFECT TITLE**, ... 382
- Extortion.** See **UNCONSCIONABLE DEALINGS**, ... 493
- Factum Valet.** See **ADOPTION**, ... 61
- Failure of Suit.** See **MONTH**, ... 265
- Failure to object to a void sale.** See **SALE (2)**, ... 334
- Failure of Consideration.** See **SHERIFF'S SALE**, ... 529
- False Charge—Preliminary Inquiry—Section 211, Indian Penal Code—Section 471, Code of Criminal Procedure.** A petition was presented to the Joint Magistrate charging the police with having made a false report of an investigation which they had been directed to make at the instance of the petitioner. The Joint Magistrate, after reading the police report, rejected the petition, and directed the petitioner to be prosecuted under section 211 of the Indian Penal Code for having made a false charge: *Held*, that the Joint Magistrate should not have made the order without first instituting an inquiry into the truth of the complaint, such as is required by section 471 of the Code of Criminal Procedure. **QUEEN v. GOUD MOHUN SINGH**, 16 W. R., 44; and in the matter of **SAYED NISSEN HOSSEIN**, 26 W. R.,
- False Charge—continued.** 10; considered. **CHOOBHAIN TELER**, In the matter of ... 315
2. ———— **Section 211, Penal Code—Order of discharge in original Complaint—When prosecution for false charge may be instituted.** A Magistrate is not competent to discharge the accused in a warrant case and order the complainant to be prosecuted for making a false complaint, until he has examined all the witnesses cited by the complainant. In the matter of **GANGOO SINGH**, ... 389
- False Evidence—Section 191, Indian Penal Code—Witness criminating himself—Evidence Act I of 1872, sec. 132.** Although a person under examination as a witness is bound by his affirmation to tell the truth, if he is examined on a point on which he is likely to criminate himself, his position should be explained to him by the Magistrate, as otherwise he may be induced, through ignorance of the state of the law, to deny the existence of facts for fear of penal consequences. Although without such a warning he may make a false denial and thereby become guilty of the offence of intentionally giving false evidence, his offence will not be deserving of severe punishment. **JADOONATH DUTT**, ... 181
- False Statement of cause of action.** See **POSSESSION, SUIT FOR**, ... 292
- Fees.** See **PLEADING**, ... 166
- Fieri Facias.** See **SHERIFF'S SALE**, ... 529
- Finding, contrary, in facts.** See **HIGH COURT**, ... 1
- Fins.** See **CATTLE TRESPASS ACT**, ... 507
- Foreclosure, Suit for.** See **RE-FORMING A DEED**, ... 156
- Foreclosure.** See **MORTGAGE IN POSSESSION**, ... 323
- Foreclosure Decree.** See **RE-FORMING A DEED**, ... 156
- Forfeiture of Recognizance—Section 503, Code of Criminal Procedure—Excessive Amount—High Court as Court of Revision—Power of Government.** The High Court, as a Court of Revision, has no power to reduce the amount of a recognizance that may have been forfeited. The Magistrate of the District should, in such a case, address Government. **NILMADHUS GHOSAL**, 19 W. R., 1, cited and followed. In the matter of **NOOR-OOZ-HUK**, ... 408
- Fraud, Allegation of.** See **MORTGAGE (2)**, ... 26
- See **EQUITABLE RELIEF**, ... 18
- See **SPECIAL APPEAL**, ... 538
- Fraud—Suit by Reversioner—Hindu Widow—Sale for Arrears of Government Revenue—Act IX of 1871, Sch. II, Art. 95.]** A, a Hindu

**Fraud—continued.**

widow in possession of a widow's estate, leased the property in paini to B, who afterwards bought A's interest in the property at a sale in execution of a money-decree. B then made default in payment of the Government revenue; the estate was sold and purchased by C. In a suit brought by the next heir in reversion against B and C after the death of the widow, it was alleged that B was the real purchaser at the sale for arrears of revenue; and that he had made default in payment of the arrears in order that the estate should be sold and the plaintiff's reversion destroyed: *Held*, that proof of these facts would entitle the plaintiff to a decree on the ground of fraud. Art. 96 of sch. 2 of Act IX of 1871, has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of that act. It does not cut down the ordinary limitation of twelve years, (allowed for instituting a suit for the possession of land), in a case where the plaintiff has been kept out of possession by the fraud of the defendant. *CHUNDER NATH CHOWDHRY v. THIRTHANUND THAKOOR* ... 147

**Fresh Evidence.** See **REVIEW OF JUDGMENT** ... 257

**Further time to Principal Debtor.** See **PRINCIPAL AND SURETY** ... 455

**General Clauses Act.** See **RIGHT OF APPEAL** ... 391

**Ghatwal.** See **IMPERFECT TITLE** ... 382

**Gift, Deed of, under Hindoo Law—Void restrictions—Life Interest—Estate Tail—Executory Devise—Conditional Limitation—Defeasance—Failure of Issue—Construction—Sunand—*Ut res magis valeat quam pereat*.]** The gift of an estate to a man *simpliciter* carries an estate of inheritance in Hindoo Law, and if to such a gift there be added an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected. *TAGORE CASE*, 4 B. L. R., 182; 9 B. L., 337; cited. The grant of a talook to A *simpliciter*, for her support, followed by a clause which declares that the generations born of her womb, but no other heir of hers, should enjoy the property, will be construed to give A an absolute estate of inheritance, defeasable in the event of A dying without issue living at her death, in which case the estate would revert to the donor and his heirs. *SOOJANMOY DOWSE v. DEMOBUNDPOO MULLICK*, 9 Moore's Ind. App., 184, cited and followed. A grantor will not be considered as

**Gift, Deed of, &c.—continued.**

intending to convey an estate which the law prohibits, unless the grant does not fairly admit of being construed in a sense to which the law will give effect. *BHOOSH MOHINDER DEKA v. HURRISH CHUNDER CHOWDHRY* ... 380

**Government, Application to.** See **FORMS OF RECOGNIZANCE** ... 400

**Government made party to Suit.** See **PARTY TO SUIT** ... 442

**Government made a party to a suit.** See **PARTY TO A SUIT** ... 447

**Grant of Certificate.** See **ADOPTION** ... 51

**Grant of Probate.** See **PROBATE** ... 436

See **PROBATE, APPLICATION**

FOR ... 432

See **APPEAL FROM OR**

DER ... 504

**Granting further time to the Principal debtor.** See **PRINCIPAL AND SURETY** ... 455

**Grounds not taken in Appeal.** See **REMANENCEMENT OF RENT** ... 37

**Growing Crops—Movable property—Registration Acts.]** The definition of movable property given in the Registration Acts is expressly given for the purposes of those Acts solely, and ought not to be extended. Standing crops are movable property, within the provisions of Act X and XV of 1877, and a suit for wrongful taking and carrying them away will be governed by Art. 36, Sch. II, Act XV of 1877. *CHUNDER BOSE v. DHURM CHUNDER BOST*, 8 B. L. R., 510; *NETTUNO MEAH v. NUSD RAID*, 508; *TOFAL AHMED v. BANET MAHAR*, *MOOKERJEE*, 24 W. R., 394, cited and followed. *PANDUR GAZI v. JENDUDDI* ... 37

**Guardian—Letters Patent, section 15—Appeal from Original Jurisdiction—Appeal from original Jurisdiction—Minor—Appointment of guardian—Paternal relatives.]** Under section 15 of the Letters Patent of 1865, an appeal lies from an order passed by a single Judge in the Original Jurisdiction of the High Court. The claims of relatives to the guardianship of a minor, stand upon quite a different footing from those of parents. The nearest paternal relatives have no legal right to the immediate custody of a child on the death of its parents. In the absence of father or mother, or guardian appointed by father, the selection of a guardian for a Hindu minor is to be made by the Court, as it represents the ruling power. *KRISTO KISSORE SINGH v. KADREMOY DOWSE* ... 37

2. — **Minor—Testamentary Guardian—Majority—Act IX of 1875, sec. 2, cl. 1.]** When a person, who by his father's will is made guardian of his minor brother, applies for and obtains probate of the will, the grant of probate establishes the authority of his appointment.

**Guardian—continued.**

Such a guardian is not one "appointed by a Court of Justice" within the meaning of cl. 1, sec. 3, Act IX of 1875, and the minor attains majority on his completing the age of eighteen years. *JOGESH CHUNDER CHAKRAVARTI v. UMATARA DEBYA* ... 577

**Guardian, Powers of.** See MINOR, LIABILITIES OF ... 249

— See ZURIPESHGI MORTGAGE ... 647

**Hatchitta.** See Relinquishment of part of claim ... 385

**Hair in possession.** See MAHOMEDAN LAW ... 223

**Heirs substituted as parties.** See EXHIBITION (2) ... 189

**Hibbanamah.** See LIMITATION ... 578

**High Court—Code of Criminal Procedure, section 263—Verdict of a Jury—Contrary finding of High Court on the facts.]** A majority of the jurors (four out of five) acquitted the prisoner on a charge of attempt to commit rape. The Sessions Judge disagreed with that verdict, and referred the case to the High Court under section 263 of the Code of Criminal Procedure, because in his opinion the offence charged was proved. The High Court found that the evidence for the prosecution was fully worthy of belief and consistent with probabilities, and sentenced the prisoner. *In the matter of TILUCKDHAREE* 1

**High Court's Act, Section 15.** See APPEAL, RIGHT OF ... 278

— See PARTY TO THE SUIT 545

**High Court, Power to reduce Bail.** See FORFEITURE OF RECOGNIZANCE ... 408

**Hindoo Law.** See ADOPTION ... 51

**Hindoo Widow.** See MITAKSHARA LAW 328  
— See FRAUD ... 147

**Hindoo widow—Power of alienation given to widow by will—Pilgrimage—Alienation for expenses of Pilgrimage—Liability of Purchaser—Application of Purchase-money.]** Where a Hindoo, by will, directed that his widow should have power to sell his property for the purpose of defraying the expenses of a pilgrimage, a bond fide purchaser from the widow who, at the time of purchase, believed and had reason to believe, that the widow was going on a pilgrimage, and that the property was sold and the money raised for that purpose, is not bound to give back the property at the suit of the reversioner, if there is any evidence that the widow did really go on the pilgrimage. *Per GARTH, C.J.*—In such case the purchase would be good, even if there is evidence that the widow had gone on a ... *R. RAM KANT CHAKRAVARTY v. NARAIN DATTA BOY* ... 474

**Hindoo Widow.** See JAIN ... 193

**Hindoo Widow's power to make a will.** See PROBATE, APPLICATION FOR ... 422

**Husband's liability for wife's debts.** See SEPARATE PROPERTY OF WIFE ... 431

**Hurt, Voluntarily causing.** See VERDICT OF JURY ... 1

**Idol, Transfer of property to.** See PARTITION, RIGHT TO ... 310

**Ignorance of Contract entered into.** See UNCONSCIONABLE BARGAINS ... 433

**Illegal Assembly—Section 530, Code of Criminal Procedure—Order of Civil Court—Section 141, Indian Penal Code—Refusal of Magistrate to summon witnesses for the defence—Section 359, Code of Criminal Procedure.]** When the contending parties are admittedly in joint possession of certain premises, a Magistrate, under section 530 of the Code of Criminal Procedure, cannot determine whether one of them is at liberty to make use of the land in such a manner as to cause annoyance to another and against his will. Such a matter is beyond his jurisdiction. Any order passed under section 530 ceases to have effect when the party aggrieved by it obtains an order from the Civil Court declaring his rights as against such order. It is not intended by section 359 of the Code of Criminal Procedure that a Magistrate should enquire generally into the nature of the defence, and then to consider whether he should absolutely abstain from summoning the whole of the witnesses cited by the accused, but that when the Magistrate considers that any particular witness is included for the purpose of vexation or delay, he should exercise his judgment and enquire whether such witness is material. The nature of the offence defined in section 141, Indian Penal Code, discussed. *RAJCOOMAR SINGH, Appealant* ... 63

**Imperfect Title—Ghatwal—Extinguishment of superior tenure—Rights of under-tenant—Zuripeshgi—Specific Relief Act I of 1877, section 18.]** A, holding a certain mehal as a ghatwal, mortgaged it to B by way of a zuripeshgi lease for 21 years. Shortly after the granting of the lease the zemindar got a decree against A, by which A's ghatwali right was extinguished. In execution of that decree the zemindar ousted and took khas possession of the mehal. Some years afterwards the zemindar granted to A a perpetual mouzrari lease of the same mehal. Held, in a suit against A, instituted by the assignee of B's rights in the zuripeshgi, that under section 18, Act I of 1877, A must, out of his present estate in the mehal, make good the zuripeshgi. *LOON-KARAIN SINGH v. SHOWKEE LALL* ... 388

**Implied Contract—Small Cause Court—Jurisdiction—Contract of Indemnity—Contract Act**

**Implied Contract—continued.**

(IX of 1872) sections 9, 70.] If A buys a tenure at a public auction *tenures* in the name of B, he impliedly contracts to indemnify B against the claims of the superior landlord; and a suit by B against A to recover the amount of a decree obtained against him by the superior landlord will lie in a Small Cause Court. **KADDESSUR MOOKERJIA v. GOOROO CHURN MOOKERJIA** 288

**Imprisonment on non-payment of Fines.**

See **CATTLE TRESPASS ACT** ... 507

**Importers. See TRADE MARK** ... 94**Inadmissibility. See BILLS OF EXCHANGE** ... 400**Indigo Concern. See INJUNCTION, RIGHT TO** ... 283

See **MORTGAGES IN POSSESSION** ... 323

**Injunction, Right to—Indigo concern—Mortgages, in possession—Sale of Patni Talook—Darpats—Regulation VIII of 1819—Representative—Execution of decree—Act VIII of 1859, section 216—Maxims of Equity.]**

In 1861, A mortgaged an Indigo concern to B, who afterwards entered into possession as mortgagee. While B was in possession, a patni included in the mortgage was brought to sale and sold for arrears of rent under the provisions of Regulation VIII of 1819. As a consequence of this sale, the darpats rights of O in this talook were cancelled; and in 1867, C brought an action for damages against the executors of A, in which he got a decree. In 1869, the executors of A sold the equity of redemption in the concern to B, and subsequently on C's application, B's name was, without objection on his part, substituted on the record as the representative of the judgment-debtor. B afterwards applied under section 15 of the Charter Act to have the order of substitution set aside, but his application was refused. *Held*, by WHITE, J., (MITTER, J., dissenting,) in a subsequent suit for an injunction, that B was entitled to have O restrained from executing the decree against him. *Held*, also, by WHITE, J., (MITTER, J., dissenting,) that the fact of the plaintiffs not appearing to oppose the substitution of his name on the record as the representative of the judgment-debtor, did not disentitle him to an injunction in this case, because the order not being warranted by the provision of section 216 of Act VIII of 1859, under which it was professed to be made, was *ultra vires* and therefore a nullity. Extent of the rule, "He that seeks equity must do equity." **AGRA BANK v. DEVERONI DEVER SEN** ... 283

**Injunction. See TRADE MARK** ... 94

**Insolvency Jurisdiction—District Judge of Akyab—Recorder of Akyab—Burmah Courts' Act XVII of 1876—Code of Civil Procedure, Act X of 1877, sections 4, 6, 344, 351.]** The Judge of the District Court at Akyab has

**Insolvency Jurisdiction—continued.**

jurisdiction to exercise the powers conferred by section 351 of the Code of Civil Procedure, Act X of 1877, in respect of a prisoner in the Civil Jail at Akyab, who has petitioned to be declared an insolvent under that section. The Recorder of Akyab has not exclusive jurisdiction in such cases, though it may be that the effect of section 6 of the Code of Civil Procedure, Act X of 1877, is to make his jurisdiction paramount to that of the District Judge. Section 66 of the *Burmah Courts' Act*, 1875, and sections 4, 6, 344, 351 of the Code of Civil Procedure, Act X of 1877, discussed. *In the matter of ABDUL HAMID* 406

**Instalments—Payment of Money by Instalments—Stipulation on Default—Limitation—Act XV of 1877, sch II, cl. 75.]**

Defendants verbally agreed to liquidate a debt by payment of monthly instalments extending over a period of two years; and it was stipulated that, on default of payment of any three successive instalments, the whole sum remaining unpaid should become due and payable. Defendants neglected to pay three instalments in succession, but no suit was brought within three years of the date of the third default: *Held*, that the stipulation did not bind the creditor to sue, but only gave him an option of doing so; and that the whole claim was not barred. Act XV of 1877, schedule II, clause 75, does not apply to verbal contracts. **KOTLASH CHUNDER DALLAK v. BOIKANTA NATH CHUNDERA** ... 11

**Instalments, Satisfaction of Decree by—Execution of Decree—Payment by Instalments—Instalment Bond—Kistbundi.]**

An agreement between the parties to a decree to reduce the amount, or to give time for its payment, or that the amount shall be paid by instalments, does not amount to a varying of the decree itself, having obtained against B a decree for the payment of money, a kistbundi was inserted in the decree, by which it was arranged that the amount of the decree should be paid by instalments of Rs. 5,000. A considerable reduction was allowed to the judgment-debtor, and the reduction was made in the amount of instalments payable. The kistbundi contained an express proviso that, on default of payment of three consecutive kists, the whole amount due under the bond was to become at once realizable; and also provided that in case of default the amount due were to be recovered by execution, so that the judgment-debtor was to make no objection. Certain instalments having fallen due, the judgment-creditor sought to enforce the kistbundi by execution: *Held*, that he was entitled to do so; that he was not bound to bring a regular suit; and that a provision in the bond by which payment might be enforced against property which could not have been attached and sold in execution of the decree, did not prevent a decree-holder from proceeding by execution.

**Instalments, &c.—continued.**

long as he did not seek to enforce that provision.  
**AMRUVUNISSA KHATOON v. MRS. MAHOMED HOSSEIN** ... .. 143

**Instalment Bond.** See **INSTALLMENTS, SATISFACTION OF DECREES BY** ... .. 143

**Interest—Execution of Decrees—Payment into Court of amount of Decree—Objection of Judgment-debtor.]** A judgment-debtor who wants to be released from the claim of his creditor must pay the money covered by the decree into Court to the credit of the decree-holder unconditionally. If he chooses to make a protest, the creditor is not bound to take the money out, subject to any liability which may arise as the consequence of such protest. A got a decree against B for a sum of money, the balance of an account. B deposited the amount of the decree in Court, objecting that Rs. 9,000, part of that sum, should not be paid out to A, on the ground that he had appealed as to three items of the account which covered that amount. The lower Court paid no attention to the objection, but did not formally disallow it, and A declined to take the Rs. 9,000. B's appeal having been dismissed, A applied for the Rs. 9,000 and got it. He then applied for interest thereon during the time it had been deposited in Court: *Held*, that he was entitled to it; for it was owing to B's act that A had been deprived of the money during the period for which he claimed interest.  
**RAJENDRA KISHORE SINGH v. SAHEB PRESHAD SEN** ... .. 183

See **EXCESS PAYMENT UNDER A DECREE** ... .. 354

**Interest after date of Decree—Mistake of Law—Interest on Decree where Decree is silent—Suit for Damages upon a Decree—Separate Suit.]** It is a mistake (of law) to suppose that execution can be issued for interest on an amount decreed, from the date of the decree to the date of realization, no such interest having been awarded by the decree; and an agreement entered into which is based on that supposition will not be set aside merely on that ground.  
**MADOOSOODUN LALL v. BHEEKAREE SINGH**, 5 W. R., 109, Misc., and **PILLAI v. PILLAI**, L. R., 3 Ind. App., 219, cited. A decree for the payment of a fixed sum of money therein specified binds the judgment-debtor to pay that sum immediately; and if he does not do so, the judgment-creditor may have an action upon the decree for damages, such damages to be computed as in the nature of interest, from the date of the decree till date of payment, on the amount of the decree remaining unpaid. In **PILLAI v. PILLAI**, L. R., 3 Ind. App., 228, their Lordships of the Privy Council, in reference to the question of levying interest upon a decree where the decree was silent as to future interest, expressly that questions of that nature be raised by a separate suit. **SEN GORUPDAS v. MULLI and ZALIM** ... 156

**Interest on decree, where decree is silent.**

See **INTEREST AFTER DATE OF DECREE** 166

**Interest deducted in advance—Discount—**

**Bills of Exchange—Public Company—Registration and publication of rules—Act X of 1866.]** It is not illegal to deduct interest in the shape of discount from the amount advanced on a bill of exchange, if such deduction be made with the full knowledge and consent of the borrower, and under such circumstances as would not lead to the inference that unfair advantage was taken of the position of the borrower. The fact that a Loan Company, registered under the provisions of Act X of 1866, has published and caused to be registered rules regarding the payment of interest on loans, does not bind a borrower to pay the interest as required by those rules, unless he has contracted to do so. **TIPPERAH LOAN OFFICE v. GOUB CHANDRA BANMAN** ... .. 349

**Interpretation of decree.** See **COSTS** ... 152

**Intervenor.** See **KARULYAT, SUIT FOR** 302

**Intervenor in Rent Suit.** See **RHS JUDICATA (3)** ... .. 10

**Involuntary Payment—Suit for contribution—Set-off—Regulation VIII of 1819, section 13, Act VIII (B.C.) of 1869, section 63.]** A and B were the proprietors of a jote, of which B leased half of his share to C as mirasidar. The zamindar brought a suit for rent of the jote against A and B and got a joint decree, in execution of which he put up the jote for sale. C, in order to save his miras right, paid the amount of the decrees before sale, and then sued A and B for the amount so paid: *Held* that C was entitled to recover, and that a claim for rent by B against C, but which C disputed, could not be admitted as an answer to C's claim in the present suit or as a set-off. It is essential to the validity of a set-off that the debts should be mutual, due from and to the same parties and in the same right. Regulation VIII of 1819, section 13, and Act VIII (B.C.) of 1869, section 63, discussed.  
**RHOIRUB CHUNDER DOSA v. HAFSEUNISSA KHATOON** ... .. 414

**Irregularity.** See **SALS (1)** ... .. 200

**Issue not decided in previous Suit.** See **RHS JUDICATA. (2)** ... .. 23

**Issues, proper to be Determined.** See **EXECUTION (2)** ... .. 189

**Jains—Hindoo Widow—Adoption—Self-acquired property—Declaratory decree—Act VIII of 1859, section 15.]** The sonless widow of a Baragi Agarwala Jain takes an absolute interest in the self-acquired property of her husband; she may adopt a son without having had her husband's authority or the permission of his heirs; a daughter's son may be adopted, and on adoption takes the place of a begotten son.

**Jains—continued.**

Act VIII of 1859, section 15, relating to Declaratory Decrees, ought to receive the same construction as section 50 of the English Act, 15 and 16 Vict., c. 86, has received from the English Courts. *KATHUMA NATCHIAR v. DORASINGA TEVER*, L. R., 2 Ind. Ap. 169, followed; *SHRO SINGH RAI v. MURAMUT DAKHO and MOORARI LALL* ... .. 193

**Joinder of Co-sharers.** See **JOINT LANDLORD, RIGHTS OF** ... .. 370

**Joinder of Parties**—"Question in the suit"—*Action for damages—Act X of 1877, section 32—Judicature Acts, Order 16, Rules 13, 18.* A sold a cargo of wheat to B, who afterwards sold it to C. Both sales were substantially upon the same samples. Subsequently C brought an action for damages against B, on the ground that the bulk of the wheat did not correspond with the samples; and B applied for an order that A be joined as a party defendant to the suit: *Held*, that section 32 of the Code of Civil Procedure would not warrant such an order, as A was not a necessary party for the purpose of "effectually disposing of all the questions in the suit" between C and B. *Judicature Acts, Order 16, Rules 13, 18, discussed.* *HAJEE MAHOMED BADSHA SAKES v. NICOL, FLEMING & Co.* ... .. 330

**Joint Decree.** See **CONTRIBUTION, SUIT FOR** ... .. 406

**Joint Family Property.** See **PARTITION, RIGHT TO** ... .. 310

**Joint Hindu Family.** See **MITAKSHARA LAW** ... .. 328

—See **EJECTMENT** 81

**Joint Landlord, Rights of—Suit for a Kabuliati—Suit for Rent at enhanced Rate—Payment of Rent separately—Joinder of Co-sharers—Enhancement—Kabuliati.** Where an entire tenure was originally held by a tenant under several co-sharers at an entire rent, and by an arrangement amongst themselves, consented to by the co-sharers on the one hand and by the tenant on the other, the latter had been in the habit of paying a portion of the rent to each co-sharer in respect of his separate share: *Held*, that under such an arrangement each co-sharer might bring a separate suit against the tenant for his share of the rent, but that the existence of such an arrangement only will not justify one co-sharer in bringing a suit for a kabuliati at an enhanced rent for his share of the tenure, or in bringing a suit to enhance the rent of that share separately, without making the other co-sharers parties to the suit. *GUNGA NARAIN DOSS v. SHABODA MOHUN ROY*, 12 W. R., 30; *SREEN MISHRA v. CROWDY*, 15 W. R., 243; *DINO CHOWDHRY v. DOORGADESH DUTT*, 19 W. R., 168; *LULUN v. HEMRAJ SINGH*, 20 W. R., 76; *INDUR CHUNDER DOOGRA v. BIL-*

**Joint Landlord, Rights of—continued.**

*DABUN TAWAKK*, 15 W. R., 21 F. 3; *SURET SOONDREY DABBA v. WATSON*, 11 W. R., 25; *ROMANATH BUKHIT v. CHAND HUNAR BHOSHIA*, 14 W. R., 432; cited and explained. *SHEIK GANI MOHOMED v. T. D. MORAN*; *DUNGA PRERHAD MYTI v. JOY KANAK HAERA* ... .. 370

**Joint Lease.** See **TENANT HOLDING UNDER A JOINT LEASE** ... .. 404

**Joint Liability—Rent Decree—Landlord and Tenant.** Plaintiff, a patnidar, got a decree for rent against B's wife, the ostensible darpatnidar. Shortly afterwards, B's nephew brought a suit against B for an 8-annas share of the darpatni, which he claimed as joint family property, and obtained a decree. Before this last decree was executed, the darpatni was sold to satisfy the rent decree, but the proceeds were insufficient. In a suit for the balance remaining due, *Held*, that B and his nephew were jointly liable for the amount. *PROMOTRONATH BANERJEE v. JOGENDRONATH ROY* ... .. 15

**Joint Mahomedan Family—Presumption—Purchase with joint funds—Onus.** A Judge is not bound as a matter of law to apply to Mahomedan family, living jointly, the rules and presumptions which have been held to apply to a joint Hindu family. When a Mahomedan family adopts the customs of Hindus, it may do so, subject to any modification of those customs which the members may consider desirable, and it must rest with the Judge, who has to decide each particular case, how far he should apply the rules of a joint Hindu family to the case of any Mahomedan family that comes before him. *VELLAI MIRA RAVUTTAN v. MIRA MOH RAVUTTAN*, 2 Mad., 414, explained. *LUDR TONNIESSA v. NAYADA KHATOON* ... .. 1

**Joint-owners.** See **SPECIAL APPEAL** ... .. 1

**Joint Possession.** See **ILLEGAL ASSEMBLY** ... .. 1

**Judicature Acts.** Order 16, Rules 13, 18 ... .. 1

**Judgment-Debtor, Execution at instance of.** See **PARTITION, DECREE FOR** ... .. 1

**Jungle lands, Possession of.** See **WATTS LANDS** ... .. 1

**Jurisdiction.** See **APPEAL, RIGHT OF** ... .. 1

—See **BENCH OF MAGISTRATES** ... .. 1

—See **CATTLE TRESPASS ACT** ... .. 1

—See **INDIAN PENAL CODE, SECTIONS 406, 409** ... .. 1

—See **SALE (2)** ... .. 1

—See **IMPLIED CONTRACT** ... .. 1

—See **PENAL CODE, SECTIONS 409** ... .. 1

**Kabuliati, Suit for—Enhancement—Tenure of Pottah—Notice of rate of Rent decreed**

suit for—*continued.*

*Kabuliat at rate fixed by Court.*] Presumption suit against B, which was in his favour. He then sued for a suit giving B any notice of the suit for which he desired the kabuliat, or without having tendered a decree. *Held*, that the Court was not to treat the suit as one for enhancement but to give a decree for a kabuliat at a rate fixed by the Court itself; and that the suit should have been dismissed. In a suit for a kabuliat it is the landlord's duty to state the rate which he wishes the tenant to give. *MANJHI v. GOBINDO CHUNDER* L. R., 241, cited and followed. *AMED ASSUR v. POGOSE* ... 8

—See ABATEMENT ... 5

—*Questions to be determined.*—Where a suit is brought for a service of the proper notice, the question is whether, as a matter of fact, the plaintiff can establish that he or some person in whom he derives title, put the plaintiff in possession of all the lands in which the kabuliat is demanded; and the question is whether he has tendered a decree, and is therefore entitled to the kabuliat. For the decision of the question it is immaterial whether the land in which the kabuliat is demanded belongs in whole to the plaintiff or to third parties; and the Court could not allow the latter to come forward against the will of the plaintiff. *NATH CHOWDHRY v. JOY SOONDER* ... 302

Suit for, by joint Landlord. See LANDLORD, RIGHTS OF ... 370

See INSTALMENTS, SATISFACTION BY ... 143

ABATEMENT ... 5

lands. See LIMITATION ... 569

for building purposes. See BUILDINGS ... 31

title, Denial of. See EJECTMENT FOR ... 208

Land and Tenant. See JOINT LIABILITY ... 15

Powers of. See RIGHT OF OCCUPANCY ... 294

in different Districts. See SONTHAL ... 478

privilege of mortgaged property. See MORTGAGE ... 26

after a subsequent Suit. See ... 10

Letters Patent, section 16. See RIGHT OF APPEAL ... 391

—section 15. See GUARDIAN 583

Letter written "Without Prejudice." See ARBITRATION ... 488

Liability of Purchaser. See HINDOO WIDOW ... 474

—See MORTGAGE OF SEVERAL PROPERTIES ... 580

Life Interest. See GIFT, DEED OF, UNDER HINDOO LAW ... 339

Light and Air—*Presumption of ownership—Adjoining Buildings—Walls of adjoining buildings built on same foundation—Obstruction.*] Where the external walls of two adjoining houses which now belong to different owners, but which at one time were the property of the same person, have been erected wholly or partly on the same foundation wall, and there is an entire absence of evidence on either side as to the dates of the several purchase or of the terms on which they were made, the presumption is that the line of demarcation of the two properties is that indicated by the superincumbent walls. *RADHA MOHUN ROY v. RAJ CHUNDER DAS* ... 377

Limitation of Right. See RIGHT OF OCCUPANCY ... 294

Limitation—*Rent Act, VIII. (B.C.) of 1869, section 27.*] The limitation prescribed in Act VIII. (B.C.) of 1869, section 27, does not apply to a suit in which plaintiff sets out his title and seeks to have his right declared and possession given him in pursuance of that title. *RAMJOY MUNDUL v. RAM SUNDUR MUNDUL* ... 4

2. —*Suit for possession—Arrears of Rent—Talook—Under-tenures—Chuckdari tenures.*] A, the owner of a talook which was sold for arrears of rent in 1838 and purchased by the Government, held chuckdari tenures in the talook which were not cancelled by the Government after the sale. A got a lease of the talook from the Government in ijara from 1842 to 1866, and in the latter year, B, who had bought the Government rights in the talook in 1861, attempted to take possession of the land. B claimed to hold by virtue of his chuckdari tenures, and a suit, which was brought in 1874 by B for possession of the land, was dismissed. In 1876, B sued A for the rents of the chuckdari tenures for the years 1272 to 1279: *Held*, that the suit was barred by limitation. *MUSSAMUT RANEE SURNOMOYE v. SHOSHEE MOOKHEE BURMONIA*, 10 Moore's Ind. Ap., 244; 2 B. L. R., 10 P. O., 11 W. R., 5 P. O.; *DEENDYAL PRAMANICK v. RADHA KISSEN DEHI*, 8 B. L. R., 587; *ESHAN CHUNDER ROY v. KHAJAH ASANOLLAH*, 16 W. R., 79; *MOHESH CHUNDER CHUCKLADAR v. GUNGA MONI DOSSI*, 18 W. R., 39; *WATSON v. DEENDRA CHUN-*

**Limitation—continued.**

**DER MOOKERJEE, I. L. R., 3 Cal., 13**; considered and explained. **HUREY PROSAUD CHOWDHRY v. GOPAL DASS DUTT** ... 450

3. ——— **Hibbanamah—Regular Suit—Res Judicata—Act IX of 1871, schedule II, cl 93** ] A suit instituted by a Mahomedan wife against her husband, for dower, was appealed to the High Court and thence to the Privy Council. Pending the appeal to the High Court, the wife agreed that she would give to A a 4-anna share of whatever she would recover in the suit, on condition that A should advance money for her maintenance and for the purpose of carrying on the appeal, and a *hibbanamah* was executed to that effect. Pending the appeal to the Privy Council the wife died; A applied to be put upon the record of the suit in her place, and the application was granted in January 1867. The suit was ultimately decided against the husband, but he objected to execution of the Privy Council decree being allowed to issue against him at A's instance, on the ground that the *hibbanamah* had been obtained by fraud and forgery. The objection was overruled and execution was allowed. *Held*, that a subsequent suit to set aside the *hibbanamah* was unaffected by the order made in the execution proceedings; but that such suit was barred by limitation, under Art. 93, Sch. II, of the Limitation Act of 1871, it not having been instituted within three years of the time when A applied to have his name substituted on the record instead of that of the wife. **ABEDGOONISSA v. AMERGOONISSA**, 20 W. R., 305; L. R., 4 I. A., 66; I. L. R., 2 Cal., 327, cited and followed. **NAKHARUDDIN MAHOMED AHSEN v. POGOSH** ... 573

4. ——— **Resumption—Assessment—Lakhiraj Lands—Decree in Resumption Suit—Act IX of 1871, Sch. II, Art. 130** ] A got a decree against B which declared that certain lands in B's possession, alleged to have been *lakhiraj* lands from before 1790, were A's *mal* lands and liable to assessment. More than twelve years after the date of this decree, A sued to assess the lands: *Held*, (affirming the decision of **AINSLIE, J.**) that the suit was not barred by the provisions of Act IX of 1871, Sch. II, Art. 130. **PROTAP CHUNDER CHOWDHRY AND OTHERS v. SHUKH SOONUR DASSER** ... 569

5. ——— **Suit for Arrears of Rent—Rent Act VIII (B.C.) of 1869, section 29—Act IX of 1871, Sch. II, Art. 110** ] Notwithstanding that rent suits are now triable by the Civil Courts and not by the Revenue Courts, and that a limitation for suits for arrears of rent is provided by Act IX of 1871, Sch. II, Art. 110, yet the general law of limitation is not extended to suits for arrears of rent; and in regard to these there is no provision relaxing the term within which they are to be brought under section 29, Act VIII (B.C.) of 1869. On the last day allowed by Act VIII (B.C.) of 1869, section 29, for

**Limitation—continued.**

filing the plaint in a suit for arrears of rent, the Courts were closed, because it was a close holiday, and the plaint was presented on the next and first open day: *Held*, that the suit was barred by limitation. **POULSON v. MODHU SUDAS PAUL**, 3 W. R., 21, Act X, Rulings, cited. **PUNAS CHUNDER GHOSH v. MUTTY LALL GHOSH JAMIRA** ... 443

— See ACT IX OF 1871: ACT XV OF 1877: PARTITION, DECREE for 165, 167, [167, 167]

— See ABATEMENT ... 5  
— See ACCOUNT STATED ... 248  
— See ADVERSE POSSESSION ... 113  
— See EXECUTION (3) ... 208  
— See INSTALMENTS ... 167  
— See WASTE LANDS, SUIT FOR POSSESSION OF ... 264  
— See EXECUTION PROCEEDINGS BARRED BY LIMITATION ... 47  
— See PROMISSORY NOTE ... 42  
— See EXCESS PAYMENTS UNDER A DECREE ... 167

— See RES JUDICATA ... 5  
— See ARBITRATION ... 47

**Local Enquiry.** See ORDER TO OPEN ROAD

**Magistrate, Refusal of, to summon witnesses for defence** ... 5

**Magistrate's Order.** See EASEMENT

**Mahomedan Law—Widow—Return—Decision of the Crown.** ] When a Mahomedan leaves no residuary heirs, but only a wife surviving, she is entitled to the return to the exclusion of the Crown. **MUSAMUT HURUM NISSA v. ALAUDEAR KHAN**, 17 W. R., 10; **MUSAMUT SORHANER v. BHETUR alias BHETUR AZIM ALI**, Select Rep., 346, (464, New M.) cited. **MAHOMED ARSHAD CHOWDHRY v. SHAM BANOO** ... 5

2. ——— **Consent—Decree—Heir to Partition—Debts of Deceased—Party to Suit—Representative.** ] Where a Mahomedan dying intestate leaves his property in possession of one or more heirs, the sale of that property on a consent decree obtained by a creditor of the deceased against the heir in possession will pass the shares of the absent heirs. **MIR ASH ALI v. ROY LUTCHMIPUT SINGH** ... 5

— See JOINT FAMILY ... 5  
— See PRE-EMPTION ... 5

**Majority.** See GUARDIAN ... 5

**Manager, Appointment of—Executed Decree—Act VIII of 1869, section 243** ] Where a judgment-debtor asks that a manager be appointed



**Manager, Appointment of—continued.**

ed under Act VIII of 1859, section 243, he must show that the circumstances are such that the order for which he applies would be a reasonable and proper one. He should not only show what is the income of the particular property and the amount due under the decree, but he should also show whether that income is unincumbered, and if incumbered, to what extent. He cannot ask the Court to make an order under this section with respect to one single property before disclosing the whole state of his affairs, the extent of his liabilities, and the means he has of meeting them. *DINOBUNDHO SINGH v. MACNAUGHTEN* 185

**Matter of Law.** See **ENHANCEMENT OF RENT** [297]

**Maxims of Equity.** See **INJUNCTIONS, RIGHT TO** ... 283

— See **MINOR, LIABILITIES OF** ... 249

**Mercantile Contract.** See **CONDITION PRECEDENT** ... 169

**Merits, Error affecting the.** See **REVIEW OF JUDGMENT** ... 257

**Misfeasance.** See **EXECUTION** ... 75

**Minor, Liabilities of—Guardian de facto—Act XL of 1858, section 18—Contract Act (IX of 1872) sections 65, 68, 70—Maxims of Equity—Representatives—Debts of deceased.]** In a suit for debt, which was brought against the representative of the debtor, i.e., his widow—as widow and guardian of her minor daughter—a decree was passed, directing that the property of the deceased should be attached and sold in execution for the purpose of realizing the amount of the decree. To prevent this, the widow borrowed a sum of money, on her own behalf and as guardian of her minor daughter, hypothecating certain property belonging to herself and her daughter. It was proved that the widow was the sole manager of the property from the death of her husband. *Held*, however, that the hypothecation was invalid as against the daughter and did not bind her estate. Since the passing of Act XL of 1858, no greater powers can be exercised by a *de facto* guardian who has not legally completed his right to manage a minor's estate than can be exercised by a guardian duly appointed under that Act. *Court of Wards* on behalf of *KHRO PERSHAD SINGH v. KUPPULMAN SINGH*, 19 W. R., 164; 10 B. L. R., 364; *SURESH CHANDER CHATTERJEE v. RAJ KISHEN MOOKERJEE*, 24 W. R., 48; 15 B. L. R., 350; and *DEBI DUTT SARKI v. SUBOOLA BISSE*, 1. L. R., 2 Cal., 283, cited and followed. The position of a person contesting his guardian's completed acts, and asking the aid of the Court to get his property back from the holder for the time being, is different from that of one who resists (having effect to that which is on its face) to a specific provision of law. The Court has said that equity must do equity."

**Minor, Liabilities of—continued.**

applies to the former case. *HANMOOMAN PERSHAD PANDY's* case, 8 Moore's Ind., Appeals, 363, distinguished. The clause in section 18 of Act XL of 1858, namely, "every person to whom a certificate shall have been granted under the provisions of this Act, may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor," means that such properties as come to the hands of the guardian may be dealt with as the minor, if of age, might deal with them, subject to the restrictions declared further on; and that such liabilities to or by the estate as may be outstanding at the time, are within the power of the guardian. But the power to charge the estate with a new debt without sanction of the Court is clearly restrained by the last clause of the section. If a contract is to be made by one to bind another who cannot bind himself, it can only be under some express authority of law; and such authority is not to be found in section 18, Act XL of 1858. Sections 65, 68—70, of the Indian Contract Act (IX of 1872) discussed. *ABASSER BROOM v. RAJ ROOP KOOWER* ... 249

**Minor—Ancestral Business—Minor's liability for debts—Partnership—Act IX of 1872, section 247—Appeal by one of two defendants—Decree of Appellate Court—Act VIII of 1859, section 337.]** A minor, on whose behalf an ancestral business is carried on, ought not to be held personally liable for debts incurred in that business. On principle, there is no difference between the nature of the liability of an infant admitted by contract into a partnership, and that of one on whose behalf an ancestral trade is carried on by a manager. Consequently, in accordance with section 247 of the Contract Act, the liability of the former should be limited to the extent of his share in the ancestral business. Where a decree, in a suit by a plaintiff against two defendants, has been acquiesced in by the plaintiff and one of the defendants, but appealed from by the other, the Appellate Court ought not, except as provided by Act VIII of 1859, section 337, change by its decree the relative positions of the plaintiff and the defendant who has not appealed. *PETUM DOME v. RAMDHON DOME, Taylor*, 279; *RAMLALL THAKURSIDAS v. LAKHMICHAND*, 1 Bom., H. C. R., Appendix li; and *JOHUNNA BIRSE v. SREENGOPAL MUSEK*, 1. L. R., 1 Cal., 470, cited. *JOY KISTO COWAR v. NITTIANUND NUDY* ... 440

— See **ZURIPESNGI MORTGAGE** ... 547

— See **GUARDIAN** ... 577, 583

**Minor's Liabilities for Debts.** See **MINOR** [440]

**Misconduct of Police.** See **COMMISSIONS TO MAGISTRATES** ... 133

**Misjoinder of Parties.** See **REM JUDICATA** 10

- Misconduct of Arbitrator.** See ARBITRATION ... 488
- Misconduct of Party to Suit.** See ARBITRATION ... 488
- Mistake.** See RE-FORMING A DEED ... 156
- Mistake of Law.** See INTEREST AFTER DATE OF DECREE ... 156
- Misunderstanding of Terms of Contract.** See UNCONSCIONABLE BARGAINS ... 483
- Misrepresentation.** See TRADE MARK ... 33
- Mitakshara.** See ADOPTION ... 61  
See EJECTMENT ... 81
- Mitakshara Law—Joint Family—Exclusion of Widow—Right of Survivorship.** Under the Mitakshara Law, an unseparated grandfather's great-grandson's grandson will exclude a widow from inheriting the estate of her husband. *SRI RAJAH YEMMULA GAYUNIDEVAMMA GARU v. SRI RAJAH YEMMULA RAMANDORA GARU*, 6 Mad. 32; and *NARAGUNTY LUTCHNEE DAVAMMAH v. VANGAMA NAIDOO*, 9 Moore's Ind. Ap. 66, cited. *RATAN DAMEE v. MODHOOSOODUN MOHAPATOR* ... 328
- Money Bond.** See BOND, CONSTRUCTION OF 138
- Money had and received.** See EXERCUTION OF JOINT DECREE ... 165
- Month, Definition of—Calendar months—Act VIII (B.C.) of 1869—Failure of suit—Relief first asked in Special Appeal.** The word "months" in Act VIII (B.C.) of 1869, means English Calendar months. [See Act V (B.C.) of 1867.] Where a plaintiff fails to make out a claim for enhanced rent, he is not entitled in Special Appeal to a decree for rent at the original rate. *KASHNE PRASHAD SEN NEOGES v. JAMIE PATIKAR* ... 265
- Mokhtar—Act XX of 1865, sections 18 and 42—Penalty—Practising as Mokhtar—Copy of Judgment—Stranger to suit.** Quære—Whether an application by a person holding an *Am-mokhtar-nama*, but having no certificate, for a copy of the judgment in a suit in which neither himself nor his employer is a party, amounts to practising as a Mokhtar within the meaning of section 13, Act XX of 1865, so as to render the applicant liable to a fine under section 42 of that Act; supposing the application to have been made for and on behalf of the employer. Strangers to a suit may obtain, as of course, copies of judgments, decrees, or orders, at any time after they have been passed or made. *In re BAMA CHURN GHOSAL* ... 553
- Mortgage—Equitable Assignment of prior Lien—Equitable Relief—False Allegations of Fraud.** A pledged certain lands to B in 1865; and on the 24th of July 1868 granted *mokurari* lease of the same lands to C. On the 5th of June 1868, shortly before the granting of the *mokurari* lease, A executed a simple mortgage of

#### Mortgage—continued.

8 annas of the same lands to D. It was proved that the consideration money given by C for the lease had been expended in paying off B's mortgage, and that the bond had been made over to C, though not formally assigned to him: *Held*, that, under these circumstances, C was entitled to stand in the place of the first mortgage; and that he was to be considered as having taken a regular assignment of the bond. *DULI CHAND v. MOHOMU DASS UPADHYA* ...

2. ———— *Lease to Mortgagee of Property mortgaged—Right of Redemption—Fraud and Collusion, Allegations of.* On the 1st of November 1866, A covenanted to pay to B Rs. 80,351, with interest on the 16th of May 1870, and pledged certain property for re-payment thereof. At the time of the mortgage this property was held by B, the mortgagee, under a lease which expired on the 10th of September 1870. On the 5th of November 1866, A granted to B a lease of the property hypothecated for a term of seventeen years from the 10th of September 1870, at a rent of Rs. 20,541 a year. The lease recited the mortgage debt, and the necessity of providing for payment of it, and contained an agreement that out of the annual rent, B should retain Rs. 16,500 on account of the debt, and pay the remainder to A. In a suit to redeem and cancel the bond and lease. *Held* that they did not form one mortgage transaction, but were separate and separate; and that A would only be entitled to set off the rent retained against the mortgage debt and interest, and thenceforth to receive the full rental of Rs. 20,351 a year for the term of the lease yet unexpired. Where a party alleges the fraud or collusion of the opposite party as a ground of relief, general allegations will not be sufficient, but the instances upon which such allegations are founded must be stated; as it is unreasonable to require the opposite party to meet a general charge of that nature without giving him a hint of the facts upon which it is to be inferred. *JOOMNA PRASAD SARKOL v. JOYRAM LALL MAHTO* ...

——— See MORTGAGES IN POSSESSION ...

#### Mortgage of several Properties—Particulars

—*Liability of subsequent purchaser—Appropriation of mortgage-debt.* Where a mortgage-debt has been obtained on a bond under which several distinct properties were pledged to secure the repayment of a sum of money, and a portion of the demand has been satisfied in execution of the decree, and the decree-holder brings a suit to enforce his claim against a *bond fide* purchaser for value in possession of one of the mortgaged properties, the defendant will not be held liable for a greater proportion of the mortgage-debt than the value of his purchase bears to that of the whole property mortgaged. *Sentia*, that, in such a suit, the *onus* is on the defendant to show that the amount claimed is more than he may

**several Properties—contd.**  
 pon to day. *Hoolas Kookere v.*  
*UN*, 8 W. R., 379, explained; *NE-*  
*ALI KHAN v. JOWAHER SINGH*, 13,  
*Ap.*, 404, followed. *HIRDEY NAR-*  
*ATTAULLA* ... 580

**Bond.** See **COLLATERAL SECUR-**  
 ... 565  
 — See **REGISTRATION** ... 428

**ond, Suit on.** See **SONTHAL PER-**  
 ... 478

**y Joint Owners Separately.** See  
**APPEAL** ... 538

**Debt, Apportionment of.** See  
**RE OF SEVERAL PROPERTIES** ... 580

**In Possession—Indigo Concern—**  
*reclosure—Mortgagee's liability for*  
*mortgagee of an indigo factory fore-*  
*ok possession of the concern, in*  
*Jeyt 1282. The rents due from the*  
*year 1282 became due at the end of*  
*d were collected by the mortgagee :*  
*1282 due to the landowners from*  
*the indigo concern also became due*  
*Jeyt 1282. Held, that the mort-*  
*gession was liable for them. E. MAC-*  
*THEEKAREE SINGH* ... 323  
 — See **INJUNCTION, RIGHT TO** 283

**liability for Rent.** See **MORT-**  
**POSSESSION** ... 323

**roperty.** See **GROWING CROPS** 527

**orporation.** See **PUBLIC SER-**  
 ... 520

**ipable homicide—Presumption from**  
**sequences of an act.]** The appel-  
 lated himself with a sword, struck  
 certain persons in a house, causing  
 h resulted in the death of one  
 k, *per JACKSON, J.*—That such  
 an inference that he intended to  
*Per AINSLIE, J.*—That though he  
 not see how his blows were direct-  
 ly struck them with a deadly weapon  
 consequences, he must have known  
 he was imminently dangerous, that it  
 probability, cause such bodily injury  
 to cause death. *Per CUNNINGHAM,*  
 offence was culpable homicide  
 or, being an unpremeditated act of  
 violence rather than an act done with  
 or intention which is essential to  
 murder. *BEJADHUR RAI* ... 211

**to Contribute.** See **CONTRI-**  
**BUTION FOR** ... 406

**under joint decree.** See  
**JOINT, SUIT FOR** ... 406

**See PUTNER SALE** ... 357

**Notice, Service of.** See **SALE OF PATNI TA-**  
**LOOK** ... 419  
 — See **ENHANCEMENT** ... 592

**Notice of rate of rent demanded.** See  
**KABULIAT, SUIT FOR** ... 8

**Notification of Sale.** See **RE-FORMING A**  
**DEED** ... 156

**Novation.** See **COLLATERAL SECURITY** ... 565

**Oaths Act.** See **REFUSAL TO TAKE AN OATH**  
 [476]

**Objection first raised in Grounds of ap-**  
**peal.** See **EJECTMENT** ... 81

**Objection of Judgment-debtor.** See **IN-**  
**TEREST** ... 183

**Obstruction.** See **LIGHT AND AIR** ... 377

**Occupancy, Right of.** See **RIGHT OF OCCU-**  
**PANCY** ... 294

**Omission to adopt a Brother's Son.** See  
**ADOPTION** ... 51

**Onus in Benamsee Transaction.** See **BENA-**  
**MEE TRANSACTION** ... 48

**Onus.** See **EJECTMENT** ... 81  
 — See **EJECTMENT, SUIT FOR (1)** ... 209  
 — See **JOINT MAHOMEDAN FAMILY** ... 308  
 — See **EASEMENT** ... 555  
 — See **MORTGAGE OF SEVERAL PROPER-**  
**TIES** ... 580

**Order to open Road—Application for a Jury**  
**—Local enquiry—Section 521, Code of Criminal**  
**Procedure.]** When the person on whom a notice  
 has been issued under section 521, Code of Ori-  
 ginal Procedure, applies for a Jury, the Magis-  
 trate is bound to appoint one, and cannot decide  
 the matter by a local enquiry. *In the matter*  
*of MOTHOOOR CHUNDER DASS* ... 509

**Order of Discharge in original complaint.**  
 See **FALSE CHARGE** ... 389

**Order to Suspend Probate.** See **APPEAL**  
**FROM ORDER** ... 589

**Order made under Act VIII of 1859.** See  
**RIGHT OF APPEAL** ... 391

**Order made without Jurisdiction.** See  
**SALE (2)** ... 334

**Original Civil Jurisdiction, Appeal from.**  
 See **GUARDIAN** ... 583

**Ownership of site of Road.** See **PUBLIC**  
**ROAD** ... 446

**Partition by Collector—Private Partition—**  
*Butwara—Regulation XIX of 1814, section 30*  
*—Valuation of Suit—Boundaries not mentioned*  
*in Plaint.]* It is not correct to say that, under  
 section 30 of Regulation XIX of 1814, the Col-  
 lector is not at liberty to make any partition

**Partition by Collector—continued.**

where the owners have already partitioned the lands amongst themselves. The true meaning of the section is that the Collector must be guided by the nature of the estate in applying the rules contained in the preceding sections of the Regulation; and that where estates are not held in common tenancy, only a portion of those rules will apply. If the parties have divided the lands without agreeing as to the shares of the Government revenue to be paid by them, respectively, all the Collector has to do, when a partition has been applied for, is to make an assignment of the revenue in proportion to the interest of each shareholder. If they have divided the lands and arranged amongst themselves as to the portion of the Government revenue which each is to pay, it is open to the Collector to accept or reject that arrangement. The Civil Court has nothing to do with the matter. A suit should be valued according to its real character. Where a plaint is so worded as that, taken strictly, the valuation would be such that the Court in which the plaint was filed would have no jurisdiction, the mere miswording of the plaint will not oust the Court of its jurisdiction. Where the object of a suit is to prevent the plaintiff's rights over certain lands from being infringed upon, the boundaries of the lands should be given in the plaint. *AJODHYA LALL v. GUMARI LALL* ... .. 124

**Partition, Decree for—Execution at instance of Judgment-debtor—Limitation** [Where a decree for partition has been obtained by one co-sharer against another, it is a joint declaration of the rights of the parties interested in the property, and must be taken to be in favour of the defendant as well as of the plaintiff. The decree may, therefore, be executed at the instance of the defendant. The proceedings taken by the plaintiff in execution of such a decree are proceedings taken on account of both plaintiff and defendant, and they may be continued at the instance of the defendant, notwithstanding that the plaintiff wishes to have the execution case struck off the file. Where defendant applies to have the execution of a decree for partition completed, more than three years after the passing of the decree, the application will not be barred by limitation if made within three years of a previous application for execution made by the plaintiff. *SHAIK KHOSRUD HOSSAIN v. NUSSE FATIMA* ... .. 187

**Partition, Right to—Joint Family Property—Transfer of property to an idol—Endowment—Presumptive Evidence.** [Partition is an incident of property in India, and if the property is the property of the several members of a joint family, and has not been actually transferred to an idol, the several members have the right of partition. Property not actually transferred to an idol, but only subject to a trust in

**Partition, Right to—continued.**

its favour, is subject to partition. Where, in a suit for resumption of certain lands, a material issue was raised as to whether the lands were the property of an idol, which all the defendants declared it to be. *Held*, in a subsequent suit between these defendants for partition, that such statements would be presumptive, but not conclusive, evidence that the property had been dedicated. *SONATUN BYSACK v. SREEMUTTY JUGGUTOODRE DASSER*, 8 Moore's Ind. App., 66, and *RADHA MOHUN MUNDUL v. JADOOMONI DASSER*, 23 W. R., 369, cited. *RAM COOMAR PAL v. JOGENDER NATH PAL* ... .. 330

**Partnership.** See MINOR ... .. 440

**Party to Suit—Accretion—Settlement—Successive Settlements with different Owners—Suit for Possession—Government made a party to a suit—Act VIII of 1859, section 73** [Where a piece of land has been surveyed and settled, at one time as an accretion to the estate of A, and at another as an accretion to the estate of B, in a suit by A against B for possession of the land, it is not, as a rule, necessary that the Government should be made a party. *MAHMOUD ISMAIL v. WINE*, 21 W. R. 328, considered and explained. *GIRDHAREE SAHO v. HEEZA LAL SHAH* ... .. 440

**2—Pauper Suits—Payment of Stamp Fee—Amendment of Decree—Application to amend person not a party to suit** [A instituted a suit in *forma pauperis* against B, to which the Government was not a party. The claim was decreed in the Court of First Instance, but the decision was reversed by the High Court on a regular appeal, and the plaintiff's suit dismissed. The decree of the High Court did not contain an order as to the payment of the stamp fees. The Government applied to have the decree amended in that respect: *Held*, that the application must be refused on the ground that the Government, not being a party to the suit, has no right to be heard in the matter. *THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. SULTAN* ... .. 440

— See JOINDER OF PARTIES ... .. 440

— See MAHOMEDAN LAW (2) ... .. 440

— See RELIGIOUS TRUSTS (2) ... .. 440

**Paternal Relatives.** See GUARDIAN ... .. 440

**Payment into Court.** See INTEREST ... .. 440

**Pauper Suits.** See PARTY TO SUIT ... .. 440

**Payable on Demand.** See PROMISSORY NOTE ... .. 440

**Payment of rent in Separate Shares.**

TENANT HOLDING UNDER A JOINT LEASE

— See JOINT LANDLORDS, RIGHTS OF ... .. 440

**Payment of Stamp Fee.** See PARTY TO SUIT ... .. 440

**Payment of money by instalment.**

See **INSTALLMENTS** ... 167  
 — See **INSTALLMENT, SATISFACTION OF DECREE BY** ... 143

**Payment of Costs of Summary Order.** See **REGULAR SUIT TO SET ASIDE SUMMARY ORDER** ... 504**Payment of debt by Tjarah Lease.** See **BOND, CONSTRUCTION OF** ... 188**Penal Code, section 21.** See **PUBLIC SERVANT** ... 520

**Penal Code, sections 408, 409—Jurisdiction—Adequate Sentence—Court of Revision.** Where a Magistrate, erroneously holding that the offence committed was one under section 408, Indian Penal Code, over which he had jurisdiction instead of under section 409, which was cognizable only by the Court of Session, tried and sentenced the accused; it was held by the High Court as a Court of Revision that his proceedings are contrary to law, and he was directed to commit the case for trial by the Court of Session. To constitute an offence under section 409 it is not necessary that the property should be that of Government, but that it should have been entrusted to a public servant in that capacity. *In the matter of Ram Soondur Poddar* ... 515

**Penal Code, section 173.** See **SUMMONS** 80**Penalty for Practising as Mookhtar.** See **MOOKHTAR** ... 553**Pilgrimage.** See **HINDOO WIDOW** ... 474**Plaint, Boundaries not mentioned in.** See **PARTITION BY COLLECTOR** ... 134**Plaintiff changing his Case.** See **SPECIAL APPEAL** ... 538

**Pleader—Pleader's Fees—Special Agreement with Client.** An application was made for leave to sue defendant in *forma pauperis*, and he agreed with certain vakils to give them full fees according to the valuation of the claim, in case they should succeed in having the application rejected. Held, that this was a valid agreement, and that the vakils, having performed their part, were entitled to recover upon it. *RAM KANT NANDI v. SHIVA NANDA RAI* ... 166

**Pleader's Fees.** See **PLEADER** ... 166**Police Investigation.** See **SUMMARY TRIAL** ... 374**Possession of Jungle Lands** ... 364

**Possession, Suit for—Trespasser—False Statement of Cause of Action.** Where a plaintiff brings a suit for possession, alleging that the defendant is a trespasser, the moment it is shown that the defendant is not in possession as a trespasser but holds as a tenant under the plaintiff, the suit must be dismissed, no matter what the character of that tenancy may be. *RAM SINGH v. HET NARAIN SARKO* 292

**Possession, Suit for.** See **PARTY TO SUIT** 467

See **WASTE LANDS** 364

**Possession, Right to.** See **EMANCIPMENT** 522**Pottah.** See **WASTE LANDS** ... 364**Pottah, Tender of.** See **KABULIAT, SUIT FOR** 8**Power of disposition by Will.** See **PROBATE, APPLICATION FOR** ... 422**Powers of Landlords.** See **RIGHT OF OCCUPANCY** ... 294**Power of Alienation given to Widow by Will.** See **HINDOO WIDOW** ... 474**Practice of the High Court.** See **CODE OF CRIMINAL PROCEDURE, SECTION 263** 518**Preliminary Inquiry.** See **FALSE CHARGE** 315**Practising as Mookhtar.** See **MOOKHTAR** 553**Presidency Magistrate's Act.** See **PUBLIC SERVANT** ... 520**Presumption.** See **JOINT MAHOMEDAN FAMILY** ... 308

See **COLLATERAL SECURITY** 565

**Presumption from Probable Consequences of Act.** See **MURDER** ... 211**Presumptive Evidence.** See **PARTITION, RIGHT TO** ... 310**Primary Liability of Plaintiff.** See **CONTRIBUTION, SUIT FOR** ... 406**Private Partition.** See **PARTITION BY COLLECTOR** ... 134**Property sold beyond Jurisdiction.** See **SALE (S)** ... 334**SHERIFF'S SALE** ... 529**Presumption of Ownership.** See **PUBLIC ROAD** ... 446

See **LIGHT AND AIR** ... 377

**Principal and Surety—Discharge of Surety—Granting further time to the principal debtor—Advance of Interest—Contract Act, IX of 1872, section 136.]** Where A owes a debt to B, for the payment of which C is surety, the question whether the receipt of an advance of interest by B from A is in effect a contract to give further time to A to pay the debt is a mixed question of law and fact. As a general rule the acceptance of interest in advance by the creditor does operate as a giving of time to the principal debtor, and consequently as a discharge to the surety. Held, in this case, that, though the creditor by taking an advance of interest did bind himself to give further time to the principal debtor, yet the surety still remained liable, as he had assented to the arrangement. *PUNJANAN GHOSH v. DALY*, 15 B. L. R. 338; *DWARKANATH MITTER v. BISHN, id.*; and *KALI PROSONNO ROY v. UMBICA CHURN BOSH*, 18 W. R. 417, cited. *PROTAP CHUNDER DASS v. GOUR CHUNDER ROY* ... 465

**Probable Accident in execution.** See DEATH, EXECUTION OF SENTENCE OF 215

**Probate—Grant of Probate—Ad valorem Duty.**—Duty not payable when probate first granted.—*Court Fees Act, 1870.* In 1882 a grant of probate was made to one of several executors, but no ad valorem duty was charged, or, as the law then stood, payable. On the death of that executor, a second grant of probate was made to two other executors of the same testator, who claimed to be exempted from the payment of the ad valorem fee prescribed by No. 11, Sch. I, of the Court Fees Act, 1870, on the ground that no ad valorem fee was chargeable at the time the first grant of probate was made: *Held*, that under the provisions of the Court Fees Act, and of Financial Notification No. 2623, published in the *Gazette of India* of April 26th, 1874, the ad valorem fee was clearly chargeable when the second grant of probate was made. *In the goods of CHAMBERS, 6 B. L. R., Appendix, 137, followed.* *In the matter of the executors of JAMES MAHR, EARL OF CORNWALLIS, deceased, 25 L. J., Exch. 149, distinguished.* *In the goods of MALCOLM GASPER ... 436*

**Probate, Application for—Will—Power of disposition by Will—Grant of Probate—Title to property disposed of—Hindu widows' power to make a will.** Where an application for probate of a will is made *bona fide*, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose. Hindu widows are no more disentitled to make a will disposing of their property than any other class of persons. *BEHARI LALL SANDAL v. JUGGO MOHUN GOSSAIN ... 422*

See APPEAL FROM ORDER 689

**Privy Council Decree—Execution—Rate of Exchange—Receipt in full—Estoppel.** A obtained a decree against B in the Privy Council for the sum of £213-10. A applied to the High Court to direct execution of this decree for the sum of Rs. 2,500-1, being the equivalent of £213-10 at the then rate of exchange. This application, together with the Privy Council decree, were sent down to the lower Court, where execution was issued for the equivalent in rupees of £213-10, taking the rupee as equivalent to two shillings. The sum was paid to the decree-holder, who signed a receipt in full. *Held*, that under the circumstances the decree-holder was not bound by the receipt in full; and that he was entitled to receive the further sum of Rs. 365-1 which the judgment-debtor had paid into Court. *LAKHPOTTY THAKOORANI v. RAJA LKELANUND SINGH ... 322*

**Promissory Note—Payable on Demand—Limitation—Act IX of 1871, Schedule II, Art. 72—Act XV of 1877, section 2, and Schedule II, Art. 73.** Under Act IX of 1871, the limitation on a promissory note payable on demand was three years from the date of making the demand.

**Promissory Note—continued.**

Under Act XV of 1877 the limitation is years from the date of making the note: that the period of limitation so prescribed by Act XV of 1877 is shorter than that prescribed by Act IX of 1871, within the meaning of s. 3 of Act XV of 1877. *OMIRTO LOZZI HOWELL ... 222*

See BILLS OF EXCHANGE

**Pre-emption—Mahomedan Law—Shareholders.** Under the Mahomedan Law a shareholder has no right of pre-emption in another. *MOHESHER LALL v. CHRISTIAN, B., 250; TEKA DHUM SINGH v. SINGH, 7 W. R. 260; ROSHUN MAHOMED KUBER, 7 W. R. 150, cited.* *NOUBUT LALL v. LALLA ROWSHUN LALL*

**Presumption.** See JOINT MAHOMEDAN

**Procedure.** See TRANSFER OF SUIT, SECTION FOR ...

**Proof of Substantial Injury.** (1) ...

**Proof of Title Deeds.** See BENEFIT ACTION ...

**Property of deceased Debtor.** SECTION (2) ...

**Property worth less than Rs. 200.** SPECIAL APPEAL ...

**Public Company.** See INTEREST IN ADVANCE ...

**Public Road—Ownership of site of Adjoining owners—Presumption of Where the land along a path, which at formed a public road but is no longer required as such, belongs on one side party and on the other to another, evidence is offered by either of the parties the site of the road being his property, the presumption is that it belongs to both the proprietors, half to one and half to the other up to the middle of the road. *MOHAMMED FAKHER v. SHEIKER TOOPANEE ...***

**Public Servant—Municipal Corporation—Public Nuisance—Corporation of Calcutta Penal Code, section 21—Presidency Magistrates' Act, IV of 1877, section 23, Act I of 1876.** The protection extended by Act IV of 1877, (the Presidency Magistrates' Act), to certain individual public servants, does not extend to a Municipal Corporation acting under the Indian Penal Code as guilty of a public nuisance. *PER ARD.* The right to prosecute any person or persons by whom any one may have been injured, is a common right which can only be taken away unless by express words or necessary implication. *PER WHITE, J., 14* full whether a Corporation is a public servant.

**Public Servant—continued.**

all; but assuming it is, neither the Corporation of Calcutta nor any of its members is a public servant removable by Government. Where a privilege is created in favour of certain persons, the meaning of the words creating the privilege should not be extended beyond their plain and natural sense. *Indian Penal Code*, section 21; *Presidency Magistrates' Act*, section 20; *Act IV (B.C.) of 1878*, disallowed. *R. v. BIRMINGHAM AND GLOUCESTER RAILWAY*, 3 Q. B. Rep., 222; *R. v. SCOTT*, 3 ditto, 547; and *R. v. THE GREAT NORTHERN OF ENGLAND RAILWAY*, 3 ditto, 215; cited. *THE EMPRESS v. CORPORATION OF CALCUTTA* ... 320

**Public Nuisance.** See PUBLIC SERVANT 521

**Purchase with Joint Funds.** See JOINT MANOMDAN FAMILY ... 208

**Purchaser, Subsequent Liability of.** See MORTGAGE OF SEVERAL PROPERTIES [680

**Putnee Talook.** See PUTTEE SALE ... 257

**Putnee Sale.—Regulation VIII of 1819**

—*Putnee Talook—Sale for arrears of Rent—Service of Notice—Sufficient Service.* Where the sale of a putnee talook for arrears of rent takes place under the provisions of Regulation VIII of 1819, due service of the notice, in the manner prescribed by the Regulation, is essential to the validity of the sale. There are provisions of the Regulation which are not considered essential, but these relate merely to the mode of proving or verifying the service of the notice. It would be dangerous to leave it open to the Court, in each instance, to say whether what had been done was equivalent to the mode of service required by the Regulation. *RAJNAB CHUNDER BAYEJEE v. BROJODHAR KONDOR CROWDERY*, 14 W. R., 489; *MURRAY LALL MOOKERJEE v. CHUNDER MADHUS MOOKERJEE*, 9 W. R., 243; *RAM SERAK GHOSH v. SUDY MOHANT DASSIA*, 23 W. R., 118; 14 B. L. R., 304; L. R., 2 Ind. App., 74; *PRITANBUR LALDA v. BANOO DAMODUR DASS*, 24 W. R., 120; considered and explained. *GOUREE LALL CHUNDER DHO v. JOODHENTH HARRAN*, 25 W. R., 141, disallowed from. *BRAGWAN CHUNDER DASS v. MADHUR ALEY* ... 257

**Questions to be determined.** See KARULUT, SUIT FOR (3) ... 302

**Question of Title, Decision on.** See SPECIAL APPEAL ... 558

**Question in the Suit.** See JOINERS OF PARTIES ... 330

**Rate of Exchange.** See PRIVY COUNCIL ... 322

**in Fall.** See PRIVY COUNCIL DE- ... 322

**Receipt for Summons, Refusal to give.** See SUMMONS ... 80

**Recorder of Akrah.** See INSOLVENCY JURISDICTION ... 455

**Redemption, Right of.** See MORTGAGE (2) [28

**Reduction of Principal.** See BOND, CONSTRUCTION OF ... 128

**Re-formation on old site—Alluvion and Diluvion—Chur Land.]** Plaintiff bought a certain chur, situated between two branches of a river, from the Government; the sale notification stating that the chur contained a certain area and was subject to a certain jumma. It appeared that at a former time the chur had been much larger and extended over a site afterwards covered with deep water, but on which, and before the plaintiff's purchase, new land had formed by accretion to the opposite side of the channel. In a suit for possession of the newly-formed land on the ground that it was re-formation on an old site: *Held*, that what the Government sold and what plaintiff bought was the chur as it existed at the date of the purchase. *GUNGA NARAIN OHOWDREY v. R. DHICA MOHUN ROY*, 21 W. R., 115, cited and distinguished. *GOLAM ALI CHOWDREY v. COLLECTOR OF BACKERBOURNE* ... 29

**Re-forming a Deed—Order for attachment and Sale—Sale Notification—Act VIII of 1859, section 249—Suit for foreclosure—Mistake—Foreclosure decrees.]** On the application of a decree-holder, an order was passed, directing that the rights and interests of the judgment-debtor in a certain village should be attached and sold in execution to satisfy a debt of Rs. 13,498-9-9. The sale notification, issued in pursuance of this order, stated that the amount to be satisfied was Rs. 16,498-9-9; and after the issue of the notification, an arrangement was entered into under which the sale was stayed, and the judgment-debtor mortgaged the property by a deed of conditional sale, to secure payment of the Rs. 16,498-9-9. *Held*, in a suit for foreclosure, that there was no authority under section 249 of Act VIII of 1859 for increasing the amount for which the village was ordered to be sold from Rs. 13,498 to 16,498, and that the deed ought, on the ground of mistake and in the absence of explanation, to be re-formed by disallowing the additional sum of Rs. 3,000. Form of a decree in foreclosure stated. *SITH GOKULDAS GOPULDAS v. MUKLI and ZALIM* ... 150

**Refund of money paid under a decree since reversed.** See EXCESS PAYMENTS UNDER A DECREE ... 354

**Refusal to give Receipt of Summons.** See SUMMONS ... 80

**Refusal to pass Judgment on award.** See ARBITRATION ... 463

**Refusal to take an oath.—Act X of 1872—The Oath's Act—Adversus presumption.]** Where

**Refusal to take an oath—continued.**

the lower Appellate Court, at the instance of the defendant, called upon the plaintiff to swear on the Koran that the defendant's case was false, which the plaintiff refused to do: *Held* that the lower Appellate Court was justified in raising a presumption, from the plaintiff's refusal, that his case was false, the Court having power to act as it did under the provisions of Act X of 1873. *ISSEN MEAH v. KALARAM CHUNDER NAW* ... 478

**Registration Acts. See GROWING CROPS** 527

See ZUMPHREY MORTGAGE ... 547

**Registration—Mortgage Bond—Evidence—Admissible in Evidence—Act VIII of 1871, sections 17 and 49.** Where a bond mortgages certain property as security for a loan, and provides that, in default, the mortgagee may take proceedings to realize the amount of the loan from the property mortgaged, such bond, if not registered, will not be admissible in evidence in a suit brought to recover the money lent and interest. Act XX of 1868, Acts VIII of 1871 and III of 1877, sections 17 and 49, discussed. *LUTCHMIPUT SINGH DUGAR v. MIRZA KHAIKAT ALI*, 4 B. L. R., 18 F. B., cited. *SHEEMUTTY MATONGINY DONGKE v. RAMNARAIN SARDHAN* 436

**Registration and Publication of Rules.**

See INTEREST DEDUCTED IN ADVANCE... 349

**Regular suit to set aside Execution Proceedings. See EXECUTION PROCEEDINGS**

BARRED BY LIMITATION ... 471

See LIMITATION... 573

**Regulation I of 1872. See SONTAL PERGUNNAHS** ... 478**Regulation XIX of 1814, section 30. See PARTITION BY COLLECTOR** ... 134**Regulation VIII of 1819. See PUTNER SALE** ... 367

See INJUNCTION, RIGHT TO 263

**Regulation VIII of 1819, section 8. See SALE OF PATNI TALOOK** ... 419

section 13. See INVOLUNTARY PAYMENT ... 414

**Regular Suit to set aside Summary Order**

—*Payment of costs of Summary Order—Costs—Act VIII of 1859, sections 289, 296—Act XXIII of 1861, section 11.* The reversal of a decree by an Appellate Court implies an order setting aside all that has been done under orders contradictory of the final order in the suit; but where a summary order, made in the course of execution proceedings, has been set aside in a separate suit brought for that purpose, it cannot be necessarily implied that the intention of the Court was to cancel everything that had been done in the course of the summary proceedings. A person, who in the course of executing a

**Regular Suit to set aside, See—continued.**

decree, had been turned out of possession by an order under section 289, Act VIII of 1859, and who was compelled to pay the costs of that order, brought a regular suit for its reversal and obtained a decree which was silent as to the costs of the summary order in consequence of the plaintiff not having demanded them: subsequently the plaintiff made an application that the costs of the summary order should be repaid to her: *Held*, that supposing the application to be an application in the suit in which the summary order was passed, the Court had no power to entertain it under section 11, Act XXIII of 1861, and it should, therefore, be dismissed. *Held*, also, that if the application be considered as application in the suit which was brought for the reversal of the summary order, then the Court had no power to import into the decree in that suit anything which was not specified therein, and that the application must therefore be dismissed. *MUMAMUT BEEBER TOYBOOS v. MAHOMED WAJID* ... 30

**Relief first asked in Special Appeal. See MONTH** ... 2

**Religious Trusts—Act XX of 1863, section 1—Endowments.** Act XX of 1863 only applies to certain religious trusts and endowments, which have been or might come to be under the management of the Government; and section 14 of the Act, although in its terms it appears to be more general than the earlier sections, applies in fact only to the same religious endowments to which the rest of the Act applies. *PUNCH COWRIE MULL v. CHUNNOO LALL*, 2, 188, cited and followed. *KAFER CHURN GIRI v. GOLABI* ... 2

2. —**Right to sue—corporation—Advocate-General—Party to suit—Act XX of 1863.** A testator, who died in 1861, directed his executors to hold certain property in trust for religious purposes of the Jains, to be applied as directed by the members, from time to time, of a local society called a "Punch," to whom was vested the management and costs of the Jain temples. *Held*, that the members of a Punch might sue to have the dedicated property ascertained and secured; that the fact of "Punch" not being a corporation was no objection to the form of the suit, as the members did not assert any personal right of ownership themselves; that the Advocate-General need not be made a party; and that no preliminary injunction is required under Act IX of 1863, section 8, that Act not applying to such a case. *PUNCH COWRIE MULL v. CHUNNOO LALL* ... 2

**Relinquishment of part of claim—Splitting claims—Distinct Accounts—Adjustments—Held—Act VIII of 1859, section 7.** A plaintiff B with gram to the value of Rs. 200, and with kheware to the value of Rs. 600. The accounts were kept distinct, but at the conclusion of the dealing the books were adjusted.



**Relinquishment of part, &c.—continued.**

a *kathchitta* given by B to A for the Rs. 800. Notwithstanding the *kathchitta*, A sued B for Rs. 600, the price of the khesaree, in the Moonsiff's Court, and for Rs. 200, the price of the gram, in the Small Cause Court. The latter suit having been rejected at the instance of the defendant, who had objected that the suit should have been on the *kathchitta*, the Moonsiff allowed A to amend his plaint so as to sue on the *kathchitta* for the Rs. 800. *Held*, that the Moonsiff was right in doing so; and that the provisions of section 7, Act VIII of 1859, in no way prevented him from making the order. **MUHAMMAD ZAHOR ALI KHAN v. MUSSAMUT THAKOORANEE RUTTA KOOKER**, 11 Moore's Ind. Ap., 468, cited and followed. **RAKTARAN KOONDOR v. SHEIKH HOSSEIN BUKSH** ... 385

**Remedy of Purchaser.** See **SHERIFF'S SALE** ... 529

**Rent Act.** See **LIMITATION** ... 4, 513

**Rent Suits.** See **LIMITATION**.  
 ————See **RES JUDICATA** (1) (3) ... 10, 33  
 ————See **SPECIAL APPEAL** ... 558

**Rent.** See **MORTGAGEE IN POSSESSION** ... 323

**Rent, Suit for at enhanced rate.** See **JOINT LANDLORD, RIGHTS OF** ... 370

**Rent Decree.** See **JOINT LIABILITY** ... 15

**Rent, Mortgagee's Liability for.** See **MORTGAGEE IN POSSESSION** ... 323

**Re-payment of Court Fees to Complainant.** See **CATTLE TRESPASS ACT** ... 507

**Repeal of Act.** See **RIGHT OF APPEAL** ... 391

**Representatives.** See **MINOR, LIABILITIES OF** [249]  
 ————See **MAHOMEDAN LAW** ... 223  
 ————See **INJUNCTION, RIGHT TO** ... 283

**Res Judicata—Misjoinder of parties—Leave to bring a subsequent suit—Limitation.]** The heir of A brought a suit for possession against B and C, alleging that B claimed under a forged will, and C under a fraudulent deed of sale from A. The Moonsiff, holding that the parties were properly joined, upheld the deed of sale, but decided against the will. The plaintiff appealed against the finding as to the deed of sale, and B against the finding as to the will. The lower Appellate Court dismissed the suit on the ground of misjoinder, reserving leave to the plaintiff to bring separate suits against each defendant: *Held*, that a subsequent suit against C was not barred by section 2, Act VIII of 1859. On the death of A, his property was taken possession of by C under an alleged deed of sale from A: *Held*, that a suit by A's heir for possession, and to set aside the deed, was governed by Act IX of sch. II, cl. 145, and not by cl. 93. **CHUN CHATTOPADHYA v. NOBOKISHORE TUCK** ... 10

**Res Judicata—continued.**

**2** ————Issue not decided in previous suit —[Suit for Arrears of Rent.] A and B were co-sharers in a certain talook to the extent of 7 as. and 4 as. respectively. B died in 1268, and in 1872, A, who used to collect the rents on behalf of B, brought a suit against one of the ryots for the rent of the 11 annas. An issue having been raised as to the extent of A's share, omitting that of B, it was decided to be 7 annas only, and he got a decree accordingly. In a subsequent suit by A's widow against the same tenant for the rent due for the 11 annas share, *Held*, that the decision in the former suit did not debar her from showing that she was entitled to the rent due on account of B's 4 annas share. **SHAMADUNNISSA BEEBER v. FERASUTOLLAH SIRDAR** 23

**3** ————Rent Suit—Intervenor.] In a suit by plaintiff for arrears of rent against one set of tenants, defendant intervened, claiming a moiety of the whole estate. His claim was dismissed in the lower Courts, and the case came up on special appeal. Meanwhile plaintiff brought suits against another set of tenants on the same estate, in which defendant again intervened on the same ground as before: *Held*, that the decision in the former set of cases, unless and until set aside in special appeal, was binding on the intervenor, even though the estate was of such value that the Court which passed the decrees in the rent suits would not have jurisdiction to try the title which was in dispute. **PRAN NATH SANDYAL v. RAM COOMAR SANDYAL** ... 33

———See **LIMITATION** ... 573

**Restitution.** See **EXECUTION** ... 75

**Resumption Suit, Decree in.** See **LIMITATION** ... 569

**Resumption.** See **ENHANCEMENT** ... 592

**Re-trial.** See **CODE OF CRIMINAL PROCEDURE, SECTION 237** ... 511

**Return.** See **MAHOMEDAN LAW** ... 46

**Revenue, Sale for Arrears of.** See **FRAUD** 714

**Reversal of Decree on a Technical Ground.** See **REVIEW OF JUDGMENT** ... 257

**Reversion.** See **EJECTMENT** ... 81

**Review of Judgment—Error in granting Review—Fresh Evidence—Reversal of decree on a technical ground—Error affecting the merits.]** The Moonsiff dismissed a suit. Afterwards he issued a rule calling upon the defendant to show cause why a review of judgment should not be granted. The defendant showed cause, but his objections were overruled; the review was granted; both plaintiff and defendant adduced new evidence, and a decree was given for the plaintiff. On appeal, the Subordinate Judge reversed this decision on the ground relied upon by the defendant in showing cause in the lower Court, namely, that the plaintiff had not established that with due diligence he could not have brought

**Review of Judgment—continued.**

forward in the original trial the evidence upon which his application for review was based. *Held*, in special appeal, that the fact of the defendant having adduced fresh evidence in the Court below did not debar him from objecting before the Subordinate Judge that the review was wrongly granted, because the order admitting it was final. The lower Appellate Court is not justified in reversing a decision of the Court of First Instance for a technical error, unless that error has affected the decision of the case on the merits. The best test to ascertain whether an erroneous interlocutory order has affected the ultimate decision on the merits, is to see whether the Court would have come to the same decision had the erroneous order not been passed. *PRANATH BHADOORY v. SUREKANT LAHOREE* ... 257

**Right of Appeal.** See CODE OF CRIMINAL PROCEDURE, SECTION 227 ... 511

**Repeal of Act—Appeal under Act VIII of 1859—Order made under Act VIII of 1859—General Clauses Act, Act I of 1908, section 6—Letters Patent, section 16.** A special appeal lies from an order made under Act VIII of 1859 which would have been appealable under that Act, although the appeal was not presented until Act X of 1877 came into operation. *PER GARTH, C.J., and JACKSON, J.*—The appeal in such cases is saved by the provisions of section 6 of the General Clauses Act, Act I of 1908. *PER MARKBY, MITTER, and ALFSLIN, J.J.*—The appeal in such cases is saved by the provisions of section 16 of the Letters Patent. *RUTTON CHUND SHERRICHAND v. HANMANTRAY SHITBAKAR*, 6 Bom., H. C. R., 168; *FRAMJI BOMANJI v. HORMAJI BAJORI*, 3 Bom., H. C. R., 49, cited. *RECHIT SINGH v. MEHRAN KOIR* ... 391

**Right of Occupancy—Admission—Limitation of Right—Powers of Landlords.** The fact that a party has appealed from the decree of the Court of First Instance solely on the ground that evidence on a particular point was excluded by the Court, is sufficient to tie him down to that point in special appeal. A ryot, who relies upon a right of occupancy, must be taken as admitting that the letting was of such a character as is contemplated by Act VIII (B.C.) of 1869, which applies only to agricultural holdings. Where land was let on the understanding that it was to be used for cultivation, the fact that the ryot has acquired a right of occupancy does not alter any of the terms of the letting, except the conditions (if any) fixing a term for the tenancy. The statutory right of occupancy cannot be extended so as to make it include complete dominion over the land subject only to the payment of a rent liable to be enhanced on certain conditions. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted; and, although a liberal

**Right of Occupancy—continued.**

construction may be adopted, it cannot extend to a complete change in the mode of enjoyment. *BAROO LALL SAHOO v. DHO NARAIN SINGH* ... 294

**Right to flow of water.** See EASEMENT, 141

**Right of Survivorship.** See MITHANRAM v. LAW ... 236

**Right to Sue.** See RELIGIOUS TRUSTS (2) 121

**Right of Way.** See EASEMENT ... 566

**Right to Possession.** See ENHANCEMENT 593

**Rules of Registered Public Company.** See INTEREST DEDUCTED IN ADVANCE ... 249

**Sale Notification.** See RE-FORMING A DEED [156]

**Sale of Patni Talook—Service of Notice—Insufficient Service—Defaulting Co-sharer—Benam purchase—Regulation VIII of 1819, section 8—Constructive Trustee.]** A and B were co-sharers of a patni which was sold for arrears of rent by the zemindar and purchased by C. A suit by A against B, C, and the zemindar, the plaintiff alleged: (1) that no sufficient notice had been given; and (2) that C purchased benam for B. *Held*, on the question of notice, that once it was found that the notice had been posted up in the cutcherry of the defendant, accordance with clause 2, section 8, Regulation VIII of 1819, it was not essential to the validity of the sale that any other notice should have been given to the defaulters themselves, or that the service should have been verified in the manner directed by the section. *Held*, also, that benam purchase having been proved, that sale must be considered good as far as the zemindar was concerned, and therefore the suit against him must be dismissed with costs; but that as against B the parties were in exactly the same position as before the sale, B being constructive trustee for A. *SONA SINGH v. LAL CHAND CHOWDHRY*, 9 W. R., 242; and *KOTLA CHUNDAS BAKSHJI v. KALKA PROHOSHO CHOWDHRY*, 16 W. R., 80, cited and followed. *JODH DEO MOHUN TAGORE v. DEBENDRO MOHUN* ... 391

**Sale for Arrears of Revenue.** See USE OF TENURE, CANCELLMENT OF ... 391

See F ... 391

See L ... 391

**Sale for Arrears of Rent.** See F ... 391

**Sale, Application for.** See EASEMENT ... 391

**Sale—Execution of Decree—Irregularity—Proof of substantial injury—Setting aside sale—Act VIII of 1859, section 20.]** In cases ... 391

**Sale—continued.**

a decree, a sale proclamation was issued, which declared that the right, title and interest of the judgment-debtor in certain property should be sold on a certain day. Before that day a portion of the property was released from attachment at the instance of a third party. No fresh proclamation was issued, but on the day of sale the release was made known to the assembled bidders, and the remainder of the property was sold. *Held*, that the omission to issue the fresh proclamation was a material irregularity which, with slight proof of substantial injury, would induce the Court to set aside the sale at the instance of the judgment-debtor. The judgment-debtor is entitled to have a proclamation issued, which shall state accurately the property to be sold, and which shall be published thirty days before the sale. **SHIB PROKASH SINGH v. SIRDAR DOYAL SINGH** ... .. 260

2. — *Property beyond jurisdiction—Order made without jurisdiction—Erroneous order—Failure to object to a void sale—Confirmation—Act VIII of 1859, section 257.*] Where a Moonsiff orders the attachment and sale of a talook, part of which lies outside the jurisdiction of his Court, the order is, as regards this latter portion, a nullity, and an attachment and a sale pursuant to the order are void. The order of a Court which is not empowered to make any order at all, does not stand on the same footing as an erroneous order by a Court empowered to deal with the subject-matter of that order. The failure to object to a sale, if the Court had no power at all to hold it, does not make the confirmation thereof conclusive. The limitation of the remedy by separate suit contained in Act VIII of 1859, section 257, applies to cases where a Court acts wrongfully within its jurisdiction, and not to cases where a Court has gone wholly out of its jurisdiction. **KALER PROSUNNO BOSE v. DENONATH BOSE MULLICK**, 20 W. R., 434; 11 B. L. R., 56; and **SYED AWAB ALI v. SHAIK WAJID MAHOMED**, 23 W. R., 233, considered. **UNNOOOL CHUNDER SNOWDREY v. HURRY NATH KOONDoo** ... 334

**Security for Performance of Decree.** See EXECUTION (3) ... .. 206

**Self-Acquired Property.** See JAINS ... 193

**Service of Notice.** See SALE OF PATNI TALOOK ... .. 419

See ENHANCEMENT OF RENT ... .. 297

See PATNI SALE ... 357

**Settlement.** See PARTY TO SUIT ... 467

**Set-Off.** See INVOLUNTARY PAYMENT ... 414

**Sentence Commuted.** See DEATH, EXECUTION OF SENTENCE OF ... .. 215

**Use of Imprisonment and Fine.** See DE OF CRIMINAL PROCEDURE, SECTION 1 ... .. 511

**Separate Property of Wife—Wife carrying on business on her own account—Husband's liability for wife's debts—Act III of 1874.]**

Where a wife carries on a separate business on her own account with which her husband has no concern, a decree for debts incurred in the management of that business should be given against the wife alone, to be executed against her separate property only. **ALEEMUDDY v. A. BRAHAM** ... .. 431

**Separate Defences.** See COSTS ... .. 152

**Separate Suit.** See INTEREST AFTER DATE OF DECREE ... .. 156

**Separate Sets of Costs.** See COSTS ... 152

**Separate Share of Rent, Suit for.** See TENANT HOLDING UNDER A JOINT LEASE 464

**Service of the Crown.** See DOMICILE ... 496

**Servitude.** See EASEMENT ... 141, 555

**Sheriff's Sale—Property without Jurisdiction—Warranty—Fieri facias—Failure of consideration—Remedy of Purchaser—Execution of writ without Jurisdiction.]** The purchaser, at a sale by the Sheriff under a writ of *feri facias*, upon being evicted by the execution-debtor, may recover the purchase-money which he has paid, from the execution-creditor, if it should turn out that the Sheriff had no authority to execute the writ at the place where the property was situate, and that he did so execute it under the authority, and by the express direction, of the judgment-creditors. Where a Sheriff seizes and sells property under a writ of *feri facias* he may be held to undertake by his conduct that he had jurisdiction to do so; although, when he has jurisdiction, he does not in any way warrant that the judgment-debtor had a good title to the property, nor guarantee that the purchaser shall not be turned out of possession by some person other than the judgment-debtor. When property has been sold under a regular execution, and the purchaser is evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor; because the Sheriff is authorized by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good. Where the Sheriff acts *ultra vires* he cannot invoke the protection which the law gives him when acting within his jurisdiction. He is in the position of an ordinary person who has sold that which he had no title to sell; and, in India, his responsibility in respect of the sale must be governed by the law relating to the sale of chattels rather than by that relating to the sale of real estate. **SIMS v. MARRYAT**, 17 Q. B., 281; **EICHHOLZ v. BANNISTER**, 34 Law Jour., C. P., 105, 17 C.B. (N. S.) 708; **CHAPMAN v. SPILLER**, 14 Q. B., 621; **HALL v. CONDER**, 2 O. P. (N. S.) 22; cited and discussed. **DORAB ALLY KHAN v. ABDool AZEEZ and AHMEDOOLLAH** ... 529

**Shipping Order.** See **CONDITION PRECEDENT** ... 169

**Shuffa.** See **PRE-EMPTION** ... 319

**Small Cause Court.** See **SUIT FOR PAPERS** 17  
**Sonthal Pergunnahs—Suit on a mortgage bond—Lands in different Districts—Act XXXVII of 1855, sections, 1, 2, 4—Act VIII of 1859, sections 12, 38—Act XXIII of 1861, section 39—Bengal Regulation I of 1872.]** A hypothecated to B, as security for the re-payment of Rs. 6,000, certain lands situated partly in the District of Moorshedabad and partly in the Sonthal Pergunnahs. In 1876, B instituted a suit in the Court of the Subordinate Judge at Moorshedabad, for the recovery of the money due on the bond by a sale of the lands hypothecated: *Held*, that the Sonthal Pergunnahs was a district within the meaning of section 388, Act VIII of 1859; and that, therefore, the High Court had power to grant the leave requested. **KALLY PROSAD RAY v. MANU CHUNDER ROY** ... 478

**Special Appeal—Joint Owners—Mortgage—Fraud and Collusion—Case made in lower Courts—Plaintiff changing his case.]** Each of two joint proprietors, A and B, separately mortgaged the whole of the joint property to different persons. B's mortgagee, who was prior in time, obtained a decree on his bond, sold and purchased the house. In a subsequent suit for confirmation of right and possession by A's mortgagee, he charged that the other bond and decree were fraudulent and collusive, and that B had no interest in the property. All these allegations were found to be false by the lower Appellate Court. *Held*, in special appeal, that the plaintiff could not recede from the case he had made in the lower Courts and claim to be entitled to a decree for A's interest in the house. **DURGUT SARKO v. PRYUG RAM** ... 538

2. **Decision on Question of Title—Title—Suit for Rent—Act VIII (B.C.) of 1869, section 102.]** In a suit for rent, in which the sum claimed was less than Rs. 100, the defendant pleaded that the plaintiff had ceased to have any interest in the land, and the suit was dismissed. There was no finding as between the plaintiff and any other person claiming title to the land: *Held*, that a special appeal to the High Court was barred by section 102, Act VIII (B.C.) of 1869. **KASHIN RAM DASS v. MAHARAJEN SHAM MOHINER**, 23 W. R., 227; and **SHAIKH DILSHU v. ISSUN CHUNDER ROY**, 21 W. R., 86; cited and followed. **DONKELLI v. TEHAN NODAY** ... 658

—See **ENHANCEMENT OF RENT** 297

—See **SUIT FOR PAPERS** ... 17

**Special Appeal, Relief first asked in.** See **MONTH** ... 265

**Specific Performance.—Contract to sell at a fair valuation—Uncertainty how to ascertain price—Limitation—Act IX of 1871, Sch. II,**

**Specific Performance—continued.**

cl. 112.] Where a contract is made to sell land at a fair valuation, and there is no difficulty in ascertaining what a fair valuation would be, the Court will take the usual means of ascertaining it and decree performance of the contract. But where the circumstances are such that the value of the land must be always to a great extent a matter of guess and speculation and the Court have in consequence no means of ascertaining by the ordinary method what a fair valuation would be, specific performance of the contract will not be decreed. Discussion as to limitation applicable to suits for specific performance. **NEW BRICKROOM COAL Co. v. BOLANAH MAHATA** ... 305

**Special Procedure.** See **CATTLE, ILLEGAL IMPOUNDING OF** ... 544

**Splitting Claims.** See **ADVERSE POSSESSION** [112]

—See **RELINQUISHMENT OF PART OF CLAIM** ... 365

**Stamp.—Document requiring a stamp—Admissible in Evidence—Appeal—Document admitted by Court of First Instance.]** Where a document is admitted by the Court of First Instance as not requiring a stamp, its admissibility cannot be questioned in special appeal. **ENATH GOLLAK v. SHAIKH MEHAJAN**, 16 W. R., 6, followed. **KHOON LALL v. JUNGLE SINGH** ... 5

—See **ACCOUNT STATED** ... 36

—See **BILLS OF EXCHANGE** ... 40

**Stipulation on Default.** See **INSTALLMENT** [1]

**Stranger to Suit.** See **MOOKHTAR** ... 1

**Substitution of Party.** See **REHANCEMENT OF RENT** ... 1

**Succession.** See **DOMICILE** ... 1

**Successive Settlements with different owners.** See **PARTY TO SUIT** ... 4

**Sufficient Service.** See **SALE OF PARTIAL TALOOK** ... 1

—See **PARTIAL SALE** ... 1

**Suit for Papers—Jurisdiction—Small Cause Court—Debtors—Special Appeal.]** Plaintiff talookdar, sued her late husband's agent for delivery up of certain account papers and documents: for an account of his agency, and default of account, for Rs. 500 as damages. *Held*, that the suit was of a nature cognizable by a Small Cause Court, and that consequently no special appeal would lie. **HARSH NAR ROY CHOWDERY v. JOY DURGHA DAS** ... 1

**Suit for Contribution.** See **INDEMNITY PAYMENT** ... 1

**Suit for Possession.** See **PARTY TO SUIT** ... 1

—See **LIMITATION** ... 1

**Suit for a Separate Share of Rent.** See  
TENANT HOLDING UNDER A JOINT LEASE 464  
**Suit on a mortgage bond.** See SOUTHAL  
PRADESHAN ... 478  
**Suit for Damages upon a decree.** See IN-  
TEREST AFTER DATE OF DECREE ... 156

**Summons.**—*Penal Code, section 173—Refusal to give receipt to summons.* The refusal to give a receipt to a summons is not an offence under section 173, Indian Penal Code. *QUEEN v. KOLYA bin FAKIR, 5 Bom. 634, Crown cases, followed. In the matter of BROODHESHWAR DUTT ... 80*

**Summary Trial.**—*Section 222, Code of Criminal Procedure—Jurisdiction—Police investigation—Discharge by Magistrate of persons sent in by Police.* It is the nature of a complaint which should determine whether a case should be tried summarily under section 222 of the Code of Criminal Procedure. Where the acts complained of amount to an offence which a Magistrate cannot try summarily, he is not competent to hold a summary trial. *In the matter of DWANANATH MOJUMDAR, 21 W. R., 69, and CHUNDEN SHERON THAKOOR, 22 W. R., 29, followed. When a Magistrate has referred a case for Police investigation and the Police arrest certain persons and send in evidence against them, he is bound to consider that evidence before he discharges them. In the matter of BRASUTOOLA v. NAJIM SHERKH ... 374*

See CODE OF CRIMINAL PRO-  
CEDURE, SECTION 227 ... 511

**Summary Order, Costs of.** See REGULAR  
SUITS TO SET ASIDE SUMMARY ORDER ... 504

**Successor.** See GIFT, DEED OF ... 239

**Survivorship, Right of.** See MITAKSHARA  
LAW. ... 323

**Suspension of Probate.** See APPEAL FROM  
ORDER ... 589

**Talook.** See LIMITATION ... 450

**Talookdary Right.** See ESTOPPEL ... 216

**Tenancy, Repudiation of.** See EJECTMENT,  
SUITS FOR (2) ... 208

—**Determination of.** See EJECT-  
MENT, SUITS FOR (1) ... 209

**Tenant holding under a joint lease.**—*Pay-  
ment of rent in separate shares.*—*Suit for a  
separate share of Rent.* Where a tenant has  
taken a lease of certain land from several co-  
sharers jointly, and has continued to pay the  
rent in its entirety to all the co-sharers; then,  
as long as the title of the co-sharers remains  
joint, the assignee of any one of them cannot  
sue against the tenant for his separate  
share of the rent, even though he makes the  
other defendants to the suit. *SREE-*

**Tenant holding, &c.**—*continued.*

FATH CHUNDER CHOWDHRY v. MOHSEN CHUN-  
DER BANERJEE, 1 C. L. R., 450, cited. ANNODA  
CHURN ROY v. KALI CUMAR ROY ... 464

**Tender of Pottah.** See KASULIAT, SUIT  
FOR ... 8

**Testamentary Guardian.** See GUARDIAN 577

**Title to Property disposed of.** See PROBATE,  
APPLICATION FOR ... 422

**Title, Question of.** See SPECIAL APPEAL 559

**Transfer of Decree, Application for.** See  
EXECUTION (2) ... 320

**Transfer of property to an idol.** See PAR-  
TITION, RIGHT TO ... 310

**Transfer of suit, Application for.**—*Code  
of Civil Procedure, Act X of 1877, section  
23—Procedure.* The fact that a portion of  
property, the whole of which is sued for in the  
Court of the Moonsiff of A, is of less value than  
the remaining portion which is within the  
jurisdiction of the Moonsiff of B, is no sufficient  
ground for an application under the Code of  
Civil Procedure, section 23, for a transfer to  
the latter Court. A party, applying under  
section 23, Act X of 1877, must first of all give  
notice to the other side; the application should  
then be received by the Moonsiff and trans-  
mitted to the High Court through the District  
Court. *MUSHAMUT PURBUNOTE v. DEON PAN-  
DAY ... 353*

**Trespasser, Tenant becoming a.** See  
EJECTMENT, SUITS FOR (2) ... 208

**Trial of different Suits together.**—*Evidence  
—Duty of Appellate Court.* A sued B for rent,  
making C a defendant; the suit was dismissed  
and A appealed. Then C sued B for rent; A  
intervened and was made a defendant; a decree  
was passed in favour of C, and A again appealed.  
On appeal the Subordinate Judge tried both  
suits on the same evidence, though there was evi-  
dence in the second case which was not before  
the lower Court on the hearing of the first:  
*Held*, that he should have recorded his reasons  
for doing so; but that the judgment would not  
be set aside on that ground, it not appearing  
that the party taking the objection had been pre-  
judiced, or that it had been raised before the  
Subordinate Judge. *PRAN NATH SANDYAL v.  
RAM COOMAR SANDYAL ... 33*

**Trial.**—*Act XVIII of 1869 (Stamp Act) section  
43—Trial by the Officer authorized to institute  
and conduct the Prosecution.* Where an officer  
has been authorized by the Collector, under sec-  
tion 43, Act XVIII of 1869, to institute and  
conduct the prosecution in certain cases, he is not  
competent also to try them. *QUEEN v. NUDYA  
CHUND PODDAR, 24 W. R., Cr., 1, followed. In the matter of GURGADEHUR BRONYA ... 173*

**Trial.** See **BENCH OF MAGISTRATES, POWER OF** [348]

— See **COMMITMENT** ... .. §

**Trade Mark—Misrepresentation—Injunction**

—*Account—Rival importers.* **PER GARTH, C.J.**

—If A, a trader, makes use of a mark which connotes a certain quality, either from its ordinary signification or from the fact that such mark is used by the trade to denote quality, then A cannot complain of the use of such mark by any other person in the same line of business. But if the mark used by A has, in its ordinary signification, nothing to do with quality, but is a symbol which has come to connote quality solely through being used by him in a certain connection, then A is entitled to the exclusive use of that mark in that connection, and an injunction will be granted to restrain a rival trader from so using it. Where A, a trader, has been selling a certain kind of cloth marked with a distinctive symbol, and this cloth has obtained peculiar value and celebrity in the eyes of the public, who have learned to place faith in the cloth sold by A by reason of its being so marked, the use of this mark by B upon similar cloth would be calculated to deceive the public into the belief that, in buying the goods marked by B, they were buying the goods which they had bought for years before imported and sold by A, and B will, therefore, be restrained from using such mark. The Court will not direct the keeping of an account of sales which may be made, but will—even on an interlocutory application—restrain the defendant from selling at all where the mischief intended to be guarded against by the injunction would be effected by allowing any sale to be made. *PER MARKEY, J.*—There is no reason why traders, who are importers only, should not have trade marks as well as manufacturers. If the law declares, as it clearly does, that no man has a right to put off his goods as the goods of a rival manufacturer, it seems to follow that no man has a right to put off his goods as the goods of a rival importer. When a trader has expressly selected and appropriated a particular device for the purpose of distinguishing his goods, such device becomes his trade mark proper, and no one else may use it; and if, without any such express selection or appropriation, a particular device comes to be associated with the trader's name, so that all goods bearing that mark are supposed to come from him, then also the law will not allow any other person to use that mark. There is, however, this distinction between the two cases: in the former, the Court will grant an injunction to restrain the use of the device by a rival trader without any evidence that the public has been deceived, or that the use of the mark is calculated to deceive them; but it will not do so in the latter case without clear evidence to that effect. **RAIKI v. FLEMING** 94

**Uncertainty how to ascertain Price.** See **SPECIFIC PERFORMANCE** ... .. 298

**Unconscionable Bargains—Extortion—Ignorance of Contract entered into—Misunderstanding of terms of Contract—Equitable Relief**

Where a party reaps the benefit of a fair and reasonable contract, into which he has entered, the fact of his not understanding its nature would be no valid answer to a claim arising out of it. And, where a party enters into a contract, the terms of which he understands and agrees to, it is no answer to a claim arising out of it that the bargain was an extortionate one. But where an extortionate bargain, likely to be misunderstood, is made with a person who is ignorant of its true nature, a Court of Equity will relieve the latter from the consequences of his act. **MACINTOSH v. HUNT, I. L. R., 3 Cal., 308**, considered and explained. **MACINTOSH v. WUSHOVE** ... .. 485

**Under-tenant, Rights of.** See **INTEREST** **TITLE** ... .. 363

**Under-tenure, Cancellation of—Auction**

*sale for arrears of Revenue.* Where, at an auction sale for arrears of revenue, the Government becomes the purchaser of the property, and afterwards makes settlement with the former proprietors of the under-tenures, the question whether or not the Government cancelled the under-tenures existing at the time of the sale, one to be decided solely according to the facts of the proceedings taken by the Collector in such case. It is a mistake to suppose that their Lordships of the Privy Council, in the case of **THE ASSAMITEE, 13 Moore's Ind. Ap., 317; 13 W. R., 24, P. C.**, intended to lay down a general rule according to which all questions of this nature are necessarily to be decided. **SHOOK v. SHANKA v. BHEEMUTTY ALLADI** ... .. 363

**Under-tenures.** See **LIMITATION** ... .. 363

**Unfair advantage.** See **INTEREST** **DEDUCT** **IN ADVANCE** ... .. 363

**Ut res magis valeat quam pereat.** **GIFT, DEED OR, UNDER HINDOO LAW** ... .. 363

**Valuation.** See **ZURIPESHOI MORTGAGE** ... .. 363

**Valuation, Contract to sell at fair.** **SPECIFIC PERFORMANCE** ... .. 298

**Valuation of Suit.** See **PARTITION BY** **LECTOR** ... .. 363

**Verdict of Jury—Section 263, Code of Criminal Procedure—Verdict of Jury disapproved Sessions Judge—Voluntarily causing hurt—Section 321, Indian Penal Code—Hurt intended one person and carried to another.]** When a man strikes a woman with a child in her hand on that part of her person which is close to the head of the child, it must be presumed that he knew that he was likely to strike the child and endanger its life. Such an act amounts to voluntarily causing grievous hurt to the child, though it may not have been the intention of the person to strike the child. When a Sessions Judge

## 2 July—continued.

case under section 263 of the Code of Procedure to the High Court, because with the verdict of the Jury, acquittal, he is bound to state the exact which, in his opinion, the prisoner has been convicted. *EMPEROR OF INDIA, Her of SAHAI RAI* ... 304

See CODE OF CRIMINAL PROCEDURE, SECTION 263 ... 518

See HIGH COURT ... 1

Attachment. See ALIENATION DURING MENT ... 325

Adversary Request. See ADVERSARY REQUEST ... 418

Adversity. See GIFT, DEED OF, UNDER NO LAW ... 339

Act Causing Hurt. See VERDICT OF ... 304

Act Conduct. See ENHANCEMENT OF ... 307

See SHERIFF'S SALE ... 539

See EASEMENT ... 555

Suit, Suit for possession of—Suit for Title and Possession—Possession

Limitation—Pottah—Evidence—[*Regule.*] Where a suit is brought

of land capable of occupation, has actually been occupied, the

prove (1) possession within the limitation, and (2) title; and these

should be dealt with separately. However, the suit is for waste or jungle

often impossible to give evidence of ownership or of possession, because

is uninhabited and uncultivated. If ownership have been exercised

in such cases it is often necessary to prove with very slight evidence of

and sometimes possession of the adjoined coupled with clear proof of title,

to show that the party who has the possession. If A and B are

proprietors, and a suit for possession of land is brought against B by

who produces a pottah of the land which had been granted to him by

that pottah is of no value as against B, unless it is shown that A's possession under it. *MOHIB-UD-DIN SINGH v. HURRO LALL SINGH* ... 364

See MAROMUDAN LAW ... 46

Widow, Hindu. See PROBATE, APPLICATION FOR ... 433

Exclusion of. See MITAKSHARA LAW ... 338

Wife carrying on business on her own Account. See SEPARATE PROPERTY OF WIFE 481

Will—Suit to set aside a will—Limitation—[*Act IX of 1871, Schedule 2, Art. 93.*] Where no fraud

is alleged, the three years' limitation in clause 93, of the 2nd Schedule to the Limitation Act

of 1871, will run from any attempt to enforce the instrument, although that attempt might not

have been known to the person who brings the suit to declare it a forgery. Plaintiff and defendant

are the widows of two joint uterine brothers. Defendant alleged that plaintiff's husband

had left his share by will to the husband of defendant. Plaintiff, who alleged that the will

was a forgery, brought a suit for a declaration of her right to her husband's share, after setting

aside the will: *Held*, that the substance of the claim being for a declaration of right, and not

to set aside the will, the suit was not governed by the three years' limitation provided by clause 93, Schedule II, Act IX of 1871. *NIJANINATH DOSS v. ANUNDMOYEE DOSS* ... 561

See PROBATE, APPLICATION FOR ... 433

Witnesses for defence, Refusal of Magistrate to Summon. See ILLEGAL ARREST ... 26

Witness criminalizing himself. See FAULTY EVIDENCE ... 181

Suripeshgi Mortgage—Registration—Valuation—Property worth less than Rs. 100—Registration Act, sec. 17, 49—Guardian—Minor—Suit by Guardian—Estoppel.] A mortgaged land

to B by a deed of suripeshgi to secure the repayment of Rs. 95. The rent was fixed by the

deed at Rs. 6-12 per annum, and this rent the tenant was to retain as interest on the Rs. 95.

The land was to be given up only on the event of the Rs. 95 being repaid: *Held*, that such a

deed was admissible in evidence, as a lease, without being registered. The guardian of a

minor who has made a lease of the minor's property for good consideration, and who, ignoring

the lease, goes to eject the lessee as a trespasser will not be allowed to recover possession on the

ground that the lease was void against the minor. *DARSHAN SINGH v. HANMANTA, I. L. R., 1 All., 374*; *ROHINI DEBIA v. SHRI CHUNDER CHATTERJEE*, 15 W. R., 558; *ISHAN CHUNDER v. SOOJA BENS*, 15 W. R., 331; *MORO VITRAL v. TUKERAM*, 5 Bom. A. C. 93; cited. *MURMUT RAY DOOLARY KOON v. THACOR BOY* ... 547











